152 U.S. 87

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. ~~1884~~. 144 U.S. 237

ALFRED ROWE, H. V. ROWE, AND B. D. ROWE,
PLAINTIFFS IN ERROR,

vs.

WILLIAM WALTER PHELPS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

FILED OCTOBER 11, 1890.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1384.

ALFRED ROWE, H. V. ROWE, AND B. D. ROWE,
PLAINTIFFS IN ERROR,

vs.

WILLIAM WALTER PHELPS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

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1 *Caption and Style of Cause.*

Be it remembered that at a term of the circuit court of the United States within and for the fifth judicial circuit and northern district of Texas, at Dallas, which term convened on the 19th day of May, A. D. 1890, and adjourned on the 9th day of June, A. D. 1890—present and presiding, the Honorable A. P. McCormick, United States district judge—the following cause, among others, came on for trial, to wit:

WILLIAM WALTER PHELPS
vs.
ROWE BROTHERS. } No. 1198.

2 In United States Circuit Court for Northern District of Texas, at Dallas.

THE STATE OF TEXAS, }
County of Dallas. }

To the judges of said court:

The petition of William Walter Phelps, who is a citizen of the State of New Jersey, residing in the county of Bergen, in said State, complaining of Alfred Rowe, H. V. Rowe, and B. D. Rowe, who are all citizens of the State of Texas, residing in Donley county, in said State, respectfully represents that on, to wit, the fifteenth day of April, in the year of our Lord one thousand eight hundred and eighty-seven, petitioner owned the fee-simple title in and to, and was as such owner entitled to the possession of, the following-described tracts of land—that is to say, one hundred and forty-one surveys, each containing six hundred and forty acres, all located and patented by virtue of land certificates issued by the State of Texas to the Houston — Great Northern Railroad Company and more particularly described by numbers of surveys and blocks and counties as surveys numbered 1, 3, 5, 7, 9, 17, 19, 21, 23, 25, 27, 29, 31, 33, 35, 43, 45, 47, 49, 51, 53, 55, 57, 59, 61, 69, 71, 73, 75, 77, 79, 81, 83, 85, 87, 95, 97, 99, 101, 103, 105, 107, 109, 111, 113, 121, 123, 125, 127, 129, in block # 22, in the county of Collingsworth, State of Texas.

And also surveys numbered 53, 55, 57, 59, 61, 69, 71, 73, 75, 77, 79, 81, 83, 85, 87, 95, 97, 99, 101, 103, 105, 107, 109, 111, 113, 121, 123, 125, 127, and 129, in block # 21, in said county of Collingsworth.

And also surveys numbered 1, 3, 5, 7, 9, 17, 19, 21, 23, and 25, in block # 23, in said county of Collingsworth.

3 Also surveys numbered 27, 29, 31, 33, 35, 43, 45, 47, 49, and 51, in block # 23, in the county of Wheeler, State of Texas.

And also surveys numbered 1, 3, 5, 7, 9, 11, and 13, in block # 29, in Donley county, State of Texas.

And also surveys numbered 11, 13, and 15, in block # 23, in said county of Donley.

And also surveys numbered 11, 13, 15, 37, 39, 41, 63, 65, 67, 89, 91, 93, 115, 117, 119, in block # 22, in said county of Donley.

And also surveys numbered 39, 41, 63, 65, 67, 89, 91, 93, 115, 117, and 119, in block # 21, in said county of Donley.

And also survey # 95, in block # 20, in said county of Donley.

And also surveys numbered 37, 39, 41, and 65, in block # 23, in the county of Gray, State of Texas. Said numbers are according to the maps of said surveys now on file in the general land office of the State of Texas.

Petitioner charges that said surveys of land formerly belonged to the New York and Texas Land Company, Limited, a corporation duly incorporated under the laws of the State of New York, and that while said New York and Texas Land Company, Limited, was such owner of said lands on, to wit, the 15th day of April, A. D. 1882, it by its president, Ira H. Evans, leased to defendant Alfred Rowe for the period of five years, ending on the 14th day of April, 1887, the following described of said surveys, to wit:

Surveys numbered 79, 81, 83, 85, 87, 89, 91, 93, 95, 97, 99, 101, 103, 105, 107, 109, 111, 113, 115, 119, 121, 123, 125, 127, 117, and 129, in block 21, and surveys numbered 1, 3, 5, 7, 9, 11, 17, 19, 21, 23, 25, 27, 29, 31, 33, 35, 37, 43, 45, 47, 49, 51, 53, 55, 57,

4 59, 61, 63, 69, 71, 73, 75; 77, 79, 81, 83, 85, 87, 89, 95, 97, 99, 101, 103, 105, 107, 109, 111, 113, 115, 121, 123, 125, 127, and 129, in block # 22, and surveys numbered 1, 3, 5, 7, 9, 11, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, 35, 37, 39, 41, 43, 45, 47, 49, and 51, in block # 23.

That subsequently the defendants herein named became partners under the firm name and style of "Rowe Bros.," and that they are now such partners, using said firm name, and are now sued as such partners.

That the said Rowe Bros., subsequently and before the expiration of the five years for which said lease was made, in their partnership business of dealing in and raising cattle, came into the possession of all of said last-described surveys of land, as well as all other surveys anywhere mentioned in this petition.

That on the 1st day of January, 1886, said defendants, in their said firm name of Rowe Bros., leased from the said New York and Texas Land Company, Limited, from that date up to and including the 14th day of April, 1887, the following described of said surveys of land, to wit:

Surveys numbered 13, 15, 39, 41, 65, 67, 91, 93, 117, and 119, in block # 22, and survey # 13, in block # 23, and surveys numbered 1, 3, 5, 7, 9, 11, and 13, in block # 29.

That previous to the 14th day of April, 1887, the said Rowe Bros. came into possession of all of said surveys mentioned in said leases as tenants of the said New York and Texas Land Company, Limited, for the periods of time and yearly rentals in said leases specified; copies of which said leases are herewith filed as parts of this petition, respectively endorsed as Exhibit "A," Exhibit "B."

5 That defendants, the said Rowe Bros., while so holding the land described in said leases, put fences around the same, as

it was provided in and by said leases might be done, and in constructing such fences and inclosing said leased lands they enclosed with said leased lands the other lands hereinbefore described, after which they put other improvements on said enclosed lands suitable to their business of pasturing and raising horses and horned cattle thereon, in which said Rowe Bros. were then and have been ever since and are now engaged.

That by agreement with said New York and Texas Land Company, Limited, and by the terms of said leases said fences and other improvements became and were, at the expiration of said leases, the property of the owner of said lands on which they were placed, and are now and have been ever since his purchase of said lands the property of petitioner.

That previous to the 15th day of April, 1887, said New York and Texas Land Company, Limited, had sold and conveyed by deed all of said lands to petitioner, and on said 15th day of April, 1888, petitioner was as such owner entitled to the possession, use, and value of all of said one hundred and forty-one sections of land, together with the fences and all other improvements thereon situated.

That when said lands were originally leased to said Rowe Bros. they were unfenced and unimproved, and by said fencing and other improvements the rental value of said lands *were* much increased.

That on the 15th day of April, 1887, and after the expiration of said leases said Rowe Bros. continued the possession and use of said one hundred and forty-one sections of land as partners as before said and as tenants of petitioner, and have ever since held and
6 do now hold possession of and use all of said lands and have kept thereon large numbers of horses and cattle and other animals that have eaten and consumed the grasses and other things found growing thereon, and said defendants have thus taken and converted to their own use the possession of said lands and have and did promise to pay petitioner the reasonable rental value thereof, from and after said 15th day of April, 1887, up to the final trial of this suit, whenever they should be requested to do so.

Petitioner charges that the reasonable rental value for the use of said lands and improvements from said 14th day of April, 1887, *have* been and *are* at the rate of eight cents per acre per annum for the time said Rowe Bros. have so held possession of said lands.

That petitioner has often requested said Rowe Bros. to pay said amount for the use of said lands, the same having long since become due and payable, but to pay the same or any part thereof they, the said Rowe Bros., have wholly failed and refused, to petitioner's damage ten thousand dollars. Wherefore he sues and prays the usual process hereof and for judgment against said Rowe Bros. as a firm and as individuals, for his said damages, and for costs of suit, etc.

LEAKE & HENRY,
Att'ys for Petitioner.

The foregoing is endorsed as follows, to wit: #1198. U. S. cir. c't, Dallas. William Walter Phelps *vs.* Rowe Bros. Plaintiff's original petition. Filed Sept. 17th, 1888. A. J. Houston, clerk.

7 In the United States Circuit Court for the Northern District of Texas, at Dallas.

The President of the United States of America to the marshal for the northern district of Texas, Greeting:

You are hereby commanded to summon Alfred Rowe, resident citizen of the county of Donley, if to be found in your district, to be and appear before the honorable circuit court of the United States at the next regular term thereof, to be holden for the fifth judicial circuit and northern district of Texas, at the court-room thereof, in the city of Dallas, on the second Monday, it being the 14th day, of January next, to answer the petition in case # 1198, filed on the 17th day of September, 1888, of William Walter Phelps against Alfred Rowe, H. V. Rowe, and B. D. Rowe, composing the firm of Rowe Bros., defendants.

The nature of the plaintiff's demand is as follows, to wit:

Suit to recover the sum of $10,000 as rental on 141 surveys of 640 acres each from 15th April, 1887; said lands situated in Collingsworth, Donley, Wheeler, and Gray counties, Texas, and were originally patented by State of Texas to Houston and Great Northern Railroad Company. For fuller statement see certified copy of petition attached to copy of citation, of which you will serve the said Alfred Rowe; also with the accompanying certified copy of said petition, and with a true copy of this writ.

Herein fail not, but due return of this writ make on or before the 14th day of January next, showing how you have executed the same.

[SEAL.] Witness the Honorable Samuel F. Miller, senior asso-
8 ciate justice of the Supreme Court of the United States, and the seal of the circuit court thereof, at Dallas, Texas, this 17th day of September, in the year of our Lord one thousand eight hundred and eighty-eight, and of American Independence the 113th year.

[SEAL.]

A. J. HOUSTON,
Clerk of said Circuit Court.

The foregoing is endorsed as follows, to wit: # 1198. U. S. circuit court, northern district of Texas, at Dallas. William Walter Phelps *vs.* Rowe Bros. Original citation to Alfred Rowe, Donley county. Issued on the 17th day of September, A. D. 1888. Houston, clerk. Returned and filed on the 26th day of October, A. D. 1888. A. J. Houston, clerk, by W. L. McDonald, deputy.

Marshal's Return.

Received this writ on the 17th day of October, 1888, and I executed the same on the 23rd day of Oct., 1888, by delivering to the within-named defendant, Alfred Rowe, at the ranch of Rowe Bros.,

in Donley Co., Texas, in person, a certified copy of the petition in this case; also a true copy of this writ.

W. L. CABELL,
U. S. Marshal, N. D. T.,
By F. N. TUCKER, *Deputy.*

Fee	$2 00
Mileage	20 04
Total	$22 04

9 In the United States Circuit Court for the Northern District of Texas, at Dallas.

The President of the United States of America to the marshal of the northern district of Texas, Greeting:

You are hereby commanded to summon B. D. Rowe, a resident citizen of the county of Donley, if to be found in your district, to be and appear before the honorable circuit court of the United States at the next regular term thereof, to be holden for the fifth judicial circuit and northern district of Texas, at the court-room thereof, in the city of Dallas, on the second Monday, it being the 14th day, of January next, to answer the petition in case # 1198, filed on the 17th day of September, 1888, of William Walter Phelps, plaintiff, against Alfred Rowe, H. V. Rowe, and B. D. Rowe, composing the firm of Rowe Bros., defendants.

The nature of the plaintiff's demand is as follows, to wit:

Suit to recover the sum of $10,000 as rental on 141 surveys of 640 acres each from 15th April, 1887; said lands situated in Collingsworth, Donley, Wheeler, and Gray counties, Texas, and were originally patented by State of Texas to Houston and Great Northern Railroad Company. For fuller statement see certified copy of petition attached to copy of citation, of which you will serve the said B. D. Rowe; also with the accompanying certified copy of said petition, and with a true copy of this writ.

Herein fail not, and due return of this writ make on or before the 14th day of January next, showing how you have executed the same.

[SEAL.] Witness the Honorable Samuel F. Miller, senior associate justice of the Supreme Court of the United States,
10 and the seal of the circuit court thereof, at Dallas, Texas, this 17th day of September, in the year of our Lord one thousand eight hundred and eighty-eight, and of American Independence the 113th year.

A. J. HOUSTON,
Clerk of said Circuit Court.

The foregoing is endorsed as follows, to wit: # 1189. U. S. circuit court, northern district of Texas, at Dallas. William Walter Phelps *vs.* Rowe Bros. Original citation to B. D. Rowe, Donley county. Issued on the 17th day of September, A. D. 1888. Houston, clerk.

Returned and filed on the 24th day of December, A. D. 1888. A. J. Houston, clerk, by W. L. McDonald, deputy.

Marshal's Return.

Received this writ on the 17th day of October, 1888, and I executed the same on the 22nd day of December, 1888, by delivering to the within-named defendant, B. D. Rowe, at the ranch of Rowe Bros., in Donley Co., Texas, in person, a certified copy of the petition in this case; also a true copy of this writ.

W. L. CABELL,
U. S. Marshal, N. D. T.,
By F. N. TUCKER, *Deputy.*

Fee	$2 00
Mileage	20 00
Total	$22 04

11 In the United States Circuit Court for the Northern District of Texas, at Dallas.

The President of the United States of America to the marshal of the northern district of Texas, Greeting:

You are hereby commanded to summon H. V. Rowe, a resident citizen of the county of Donley, if to be found in your district, to be and appear before the honorable circuit court of the United States, at the next regular term thereof, to be holden for the fifth judicial circuit and northern district of Texas, at the court-room thereof, in the city of Dallas, on the second Monday, it being the 14th day, of January next, to answer the petition in case # 1198, filed on the 17th day of September, 1888, of William Walter Phelps, plaintiff, against Alfred Rowe, H. V. Rowe, and B. D. Rowe, composing the firm of Rowe Bros., defendants.

The nature of the plaintiff's demand is as follows, to wit:

Suit to recover the sum of $10,000 as rental on 141 surveys of 640 acres each from 15th April, 1887; said lands situated in Collingsworth, Donley, Wheeler, and Gray counties, Texas, and were originally patented by State of Texas to Houston and Great Northern Railroad Company. For fuller statement see certified copy of petition attached to copy of citation, of which you will serve the said H. V. Rowe; also with the accompanying certified copy of said petition, and with a true copy of this writ.

Herein fail not, and due return of this writ make on or before the 14th day of September next, showing how you have executed the same.

12 Witness the Honorable Samuel F. Miller, senior associate justice of the Supreme Court of the United States, and the seal of the circuit court thereof, at Dallas, Texas, this 17th [SEAL.] day of September, in the year of our Lord one thousand eight hundred and eighty-eight, and of American Independence the 113th year.

A. J. HOUSTON,
Clerk of said Circuit Court.

The foregoing is endorsed as follows, to wit: #1198. U. S. circuit court, northern district of Texas, at Dallas. William Walter Phelps *vs.* Rowe Bros. Original citation to H. V. Rowe, Donley county. Issued on the 17th day of September, A. D. 1888. Houston, clerk. Returned and filed on the 24th day of December, A. D. 188–. A. J. Houston, clerk, by W. L. McDonald, deputy.

Marshal's Return.

Received this writ on the 17th day of Oct., 1888, and I executed the same on the 22nd day of Dec., 1888, by delivering to within-named defendant, H. V. Rowe, at the ranch of Rowe Bros., in Donley Co., in person, a certified copy of the petition in this case; also a true copy of this writ.

W. L. CABELL,
U. S. Marshal, N. D. T.,
By F. N. TUCKER, *Deputy.*

Fee	$2 00
Mileage	20 04
Total	$22 04

13 In the Circuit Court of the United States for the Northern District of Texas at Dallas.

WILLIAM WALTER PHELPS
vs.
ROWE BROS. } #1198.

Now come the defendants and demur to plaintiff's petition, and say that the matters therein alleged are insufficient in law for plaintiff to recover; and of this they pray the judgment of the court.

CRAWFORD & CRAWFORD,
L.
Attorneys for Defendants.

And, answering, the defendants deny all and singular the allegations in plaintiff's petition contained, and of this they put themselves upon the country and pray to be hence discharged with their costs.

CRAWFORD & CRAWFORD,
L.
Attorneys for Defendants.

The foregoing is endorsed as follows, to wit: #1198. William Walter Phelps *vs.* Rowe Brothers. Original answer. Filed Jan'y 18th, 1889. A. J. Houston, clerk.

14 WM. W. PHELPS
vs.
ROWE BROTHERS. } # 1198.

JUNE 2D, 1890.

Ordered by the court that the defendants have leave to amend.

15 In the Circuit Court of the United States for the Northern District of Texas, at Dallas.

WM. WALTER PHELPS
vs.
ROWE BROS. } # 1198.

Now come the defendants and by leave of court file this their amended original answer, amending their answer filed on January 18, 1889, and say:

For answer hereto they deny all and singular the allegations in plaintiff's petition contained and demand strict proof.

CRAWFORD & CRAWFORD,
Att'ys for Def'ts.

And, specially answering, these defendants say that at the date of the expiration of the lease of the lands from the New York & Texas Land Co., Limited, these defendants owned in fee simple about 74,000 acres of land enclosed in the same pasture as the lands of plaintiff, but not alternating with said lands, but lying in different portions of said pasture.

That in addition to the lands so owned by them they had leased from the State of Texas about 150,000 acres of land, all of said land being in sections and some of it alternating with the various sections claimed by the plaintiff and mentioned in this suit; that in addition to said land so leased from the State these defendants had other lands leased from other parties, amounting to about 2,000 acres. Defendants say that at the expiration of said lease they entered into some negotiations with the plaintiff looking to a release of said lands; that they could not effect a renewal of
16 the lease upon terms satisfactory, and that thereupon plaintiff was notified that he could take possession of said lands and improvements thereon in accordance with the terms of said lease, and that these defendants have always been willing that plaintiff should take possession of said lands according to the terms of said lease, and have at no time exercised any possessory right or claimed any authority to control said lands since the expiration of said lease, but that the same has always been at the disposal of said plaintiff.

Defendants further say that a very small portion of the fence enclosing said pasture, to wit, only about five miles, is on the lands claimed and owned by the plaintiff, and that his right to that fence and the other improvements on said land has never been denied. Defendants say that at no time since the expiration of said lease

have they had upon said range more stock than could be pastured upon the lands owned by them and those leased from the State, and have not needed the lands of the plaintiff, and have not withheld the same from him. Wherefore defendants pray to be discharged hence without day.

CRAWFORD & CRAWFORD,
Att'ys for Defendants.

The foregoing has the following endorsement, to wit: #1198. Wm. Walter Phelps *vs.* Rowe Brothers. (Defendants' first amended original answer.) Filed June 2, 1890. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

17 W. W. PHELPS *vs.* ROWE BROTHERS. } #1198.

JAN'Y 31ST, 1890.

Ordered by the court that the plaintiff has leave to amend.

18 WILLIAM WALTER PHELPS *vs.* ROWE BROS. } #1198.

Suit pending in U. S. circuit court for the northern district of Texas, at Dallas.

Now comes the plaintiff, William Walter Phelps, in the above-entitled cause and, leave being had of the court, files this his first amended original petition in lieu of his original petition filed herein September 17, 1888, as follows, to wit:

To the judges of the United States circuit court for the northern district of Texas, holding its sessions at Dallas:

William Walter Phelps, complaining of Alfred Rowe, H. V. Rowe, and B. D. Rowe, respectfully represents that—

1. Plaintiff is a citizen of the State of New Jersey and resides in the county of Bergen, in said State.

The several defendants are citizens of the State of Texas and reside in the county of Donley, in said State.

3. On, heretofore, to wit, the 15th day of April, 1887, plaintiff was seized and possessed, and as the owner thereof was entitled to the possession, of the following-described tracts of land—that is to say, one hundred and forty-one surveys, each containing 640 acres, each and all located and patented by virtue of land certificates issued by the State of Texas to the Houston & Great Northern Railroad Company, and more particularly described by numbers of surveys, blocks, and counties as follows, viz:

Surveys numbered 1, 3, 5, 7, 9, 17, 19, 21, 23, 25, 27, 29, 31, 33, 35,
43, 45, 47, 49, 51, 53, 55, 57, 59, 61, 69, 71, 73, 75, 77, 79, 81,
19 83, 85, 87, 95, 97, 99, 101, 103, 105, 107, 109, 111, 113, 121,
123, 125, 127, and 129, in block #22, in the county of Col-

lingsworth, in the State of Texas; and also surveys numbered 53, 55, 57, 59, 61, 63, 65, 67, 69, 71, 73, 75, 77, 79, 81, 83, 85, 87, 95, 99, 97, 101, 103, 105, 107, 109, 111, 113, 121, 123, 125, 127, and 129, in block # 21, in said county of Collingsworth; and also surveys numbered 1, 3, 5, 7, 9, 17, 19, 21, 23, and 25, in block # 23, in said county of Collingsworth; and also surveys numbered 27, 29, 31, 33, 35, 43, 45, 47, 49, and 51, in block # 23, in the county of Wheeler, State of Texas; and also surveys numbered 1, 3, 5, 7, 9, 11, and 13, in block # 29, in Donley county, State of Texas; and also surveys numbered 11, 13, and 15, in block # 23, in said county of Donley; and also surveys numbered 11, 13, 15, 37, 39, 41, 63, 65, 67, 89, 91, 93, 115, 117, and 119, in block # 22, in said county of Donley; also surveys numbered 39, 41, 63, 65, 67, 89, 91, 93, 115, 117, and 119, in block # 21, in said county of Donley; and also surveys numbered 95, in block # 20, in said county of Donley; and also surveys numbered 37, 39, 41, and 65, in block # 23, in the county of Gray, State of Texas. Said numbers are according to the maps of said surveys now on file in the general land office of the State of Texas.

Petitioner says that the said surveys of land formerly belonged to the New York and Texas Land Co., Limited, a corporation duly incorporated under the laws of the State of New York, and that while said corporation was such owner of said lands, on, to wit, the 15th day of April, A. D. 1882, it by its president, Ira H. Evans, leased to defendant Alfred Rowe for the period of five years, ending on the 14th day of April, 1887, the following-described of said surveys, to wit:

Surveys numbered 79, 81, 83, 85, 87, 89, 91, 93, 95, 97, 99, 101, 103, 105, 107, 109, 111, 113, 115, 117, 119, 121, 123, 125, 127, and 129, in block # 21, and surveys numbered 1, 3, 5, 7, 9, 11, 17, 19, 21, 23, 25, 27, 29, 31, 33, 35, 37, 43, 45, 47, 49, 51, 53, 55, 57, 59, 61, 63, 69, 71, 73, 75, 77, 79, 81, 83, 85, 87, 89, 95, 97, 99, 101, 103, 105, 107, 109, 111, 113, 115, 121, 123, 125, 127, and 129, in block # 22, and surveys numbered 1, 3, 5, 7, 9, 11, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, 35, 37, 39, 41, 43, 45, 47, 49, and 51, in block # 23.

Subsequently defendants herein became partners under the firm name and style of Rowe Bros., and they are now such partners, using said firm name, and are sued as such partners. After they had entered into such partnership, and before the expiration of said lease, the said Rowe Bros., in pursuance of the business of their said partnership, which included raising, feeding, and pasturing horses and horned cattle, came into the possession and use of all of the aforesaid lands described as leased to the said Alfred Rowe, as well as all other surveys mentioned anywhere or in any connection in this petition.

Petitioner alleges that on the 1st day of January, A. D. 1886, said defendants, in their said firm name of Rowe Bros., leased from the said New York & Texas Land Co., Limited, from that date up to and including the 14th day of April, 1887, the following-described of said surveys of land, to wit: Surveys numbered 13, 15, 39, 41, 65, 67, 91, 93, 117, and 119, in block # 22, and surveys # 13, in block # 23, and surveys numbered 1, 3, 5, 7, 9, 11, and 13, in block # 29.

That previous to the 14th day of April, 1887, the said Rowe Bros. came into the possession of all of said surveys mentioned in said leases as tenants of the said New York & Texas Land Co., Limited, for the periods of time and yearly rentals in said leases specified and payable as therein specified—that is to say, in the lease made as aforesaid to Alfred Rowe, it was agreed by the said Alfred
21 Rowe that he would pay said New York & Texas Land Co., Limited, in advance, on the 15th day of April of each year, the sum of $1,356.80, which was at the rate of two cents per acre per annum for said land; and in the lease made as aforesaid to the said Rowe Bros. for eighteen surveys of 640 acres each, dated January 1, 1886, the said Rowe Bros. promised to pay said New York & Texas Land Co., Limited, for use or rent of said land, the sum of $168 on the first day of January, 1886, and on the 15th day of April, 1886, the sum of $566; said payments were to be advanced payments, and were at the rate of two cents per acre for said land per annum.

That according to the terms of said leases the sum of $1,356.80 became due and payable on said first-described lease, made to Alfred Rowe, on each of the dates of April 15, 1887, and April 15, 1888, for the rent of the lands therein described for the twelve months next following each of said dates, and the sum of $576 became due and payable on said second-described lease to Rowe Bros. on each of the dates, 15th day of April, 1887, and 15th day of April, 1888. Copies of said leases were filed with and made a part of the original petition herein and are now made *copies* of this amended petition.

Petitioner charges that all of the above-described lands are now inclosed by a fence. When said leases were made said lands were unfenced and otherwise unimproved, and it was part of the consideration and agreement between the lessor and the lessees that the said land should be fenced and other improvements be placed thereon, such as wells, water tanks, wind-mills, and buildings, all useful and valuable to the occupant of the land and increasing its rental value, and which the tenant should have the use of until the expi-
22 ration of said leases without additional charge therefor, but which at the expiration of said leases should become the property of the owners of said lands; that said improvements were placed on said land during the periods of said leases and have enhanced the rental value of said land at least two cents per acre per annum, and the use of said improvements are and have been since the expiration of said leases of the annual value of at least two cents per acre.

That previous to the 15th day of April, 1887, said New York & Texas Land Co., Limited, sold and conveyed all of the above-described lands to petitioner, and on the 15th day of April, 1887, petitioner, as such owner, was entitled to the use and possession of all of said lands and all fences and other improvements previously placed and then situated thereon; that on said 15th day of April, 1887, and from thence until now said Rowe Bros. continued in the possession and use of said lands and all improvements thereon; that previous to said 15th day of April, 1887, and before the sale of

said lands to petitioner, said firm of Rowe Bros. had as such firm and as tenants of the said New York & Texas Land Co., Limited, taken possession of, occupied, and used all of said lands under the terms of said leases, and as such firm had paid the rent thereon as it matured to said New York & Texas Land Co., Limited, and had treated themselves as and had been recognized by said New York & Texas Land Co., Limited, as its tenants under and according to the terms of said leases.

That the said Rowe Bros. failed as aforesaid to yield up said premises to the owner of said lands at the expiration of said leases and failed and refused and still fail and refuse to pay to petitioner or to said vendor of petitioner said sums of money stipulated to be paid in said leases or any other sum or sums of money, notwith-
23 standing said sums of money have long since been due and payment thereof *have* often been demanded of defendants, to petitioner's damage ten thousand dollars.

That petitioner notified defendants, upon the expiration of said leases, that on account of the increased value of the use thereof by reason of said improvements and for the use of said improvements, together with said land, they would be required to pay an increased annual rental for said land—that is to say, an additional two cents per annum per acre for it, or for land and improvements, four cents per acre, which petitioner charges was the reasonable value of the use of said land as improved by defendants; but, notwithstanding such notification, said Rowe Bros. have ever since continued their exclusive use and possession of all of said land so improved, pasturing and keeping thereon large herds of cattle and horses and destroying and appropriating the herbage found growing thereon.

Petitioner further says that defendants, as aforesaid, have repaired, maintained, and kept in position the fences around said sections of land hereinabove described, a part of which fences are erected upon the land of plaintiff and part upon land belonging to the State of Texas, being alternate sections, located in connection with plaintiff's said surveys originally; and defendants have since then erected other and further fences upon said lands, and have thereby included within their said boundaries each and all of the sections of land belonging to plaintiff hereinabove described, and they have excluded cattle and stock of any and all persons from ranging thereon, and have kept the same for their exclusive use, and have grazed the same with their said cattle since the date of their pos-
24 session aforesaid up to and including the present time.

That by reason of the premises herein aforesaid the defendants severally and as partners became liable, undertook, and promised to pay plaintiff the reasonable value for the use and occupation of his said lands, and notwithstanding the said sums of money have long since become due and payment thereof has often been demanded, the defendants have failed and refused to pay said debt or any part thereof, to plaintiff's damage in the sum of, to wit, twenty-five thousand dollars.

And plaintiff further charges that defendants have had continuous and exclusive possession of said lands described hereinabove

ever since the expiration of said written leases, and have by the use of the fences erected and maintained by them and by herding excluded all other cattle from the same, and have kept thereon their own cattle and horses and others for hire, up to and including this time, to the number of, to wit, 25,000 head; that said cattle were more than enough to eat and destroy annually all of the grass on defendants' land and all of plaintiff's within said inclosure, all of which was and is fully worth the sum of five cents per acre per annum. The value of all this has been received and appropriated by defendants to their own use, to the damage of plaintiff in the sum of $50,000.00.

Wherefore petitioner sues, and prays for the usual process and for judgment against said defendants as a partnership and as individuals for his said rents and damages and costs of suit and for general relief.

LEAKE, SHEPHERD & MILLER,
Att'ys for Petitioner, Wm. Walter Phelps.

25 The foregoing is endorsed as follows, to wit: # 1198. William Walter Phelps *vs.* Rowe Bros. Plaintiff's first amended original petition. Filed Jan'y 31, 1890. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

26 WM. WALTER PHELPS *vs.* ROWE BROS. } # 1198.

JUNE 4TH, 1890.

On this day, this cause being called for trial, came the parties, plaintiff and defendants, and announced ready; then came a jury of twelve good and lawful men, to wit, H. C. Melton, G. Ross, H. T. Hopkins, H. D. Mahoney, B. F. Millican, J. N. Swadley, Frank Stodden, J. J. Attiberry, J. Collins, C. T. Baker, Peter J. Hendricks, and W. A. Robinson, who were duly and legally elected, empannelled, and sworn to try this cause, who, after hearing the pleadings, evidence, argument of counsel, and charge of the court, retired to consider of their verdict and soon thereafter returned into open court the following verdict, to wit:

"We, the jury, find for the plaintiff the sum of $7,739.00.
W. A. ROBINSON, *Foreman.*"

It is therefore considered by the court, and so ordered and adjudged, that the plaintiff, William Walter Phelps, do have and recover of and from the defendants, Alfred Rowe, H. V. Rowe, and B. D. Rowe, the sum of seven thousand seven hundred and thirty-nine dollars ($7,739.00), with interest thereon from this date at the rate of eight per cent. per annum, besides all costs of suit, for which execution may issue.

It is further ordered that the officers of court and all parties entitled to costs do have and recover of and from the parties hereto

the costs by them herein respectively incurred, for which execution may also issue.

27 In Circuit Court of the United States for the Northern District of Texas, at Dallas.

WM. WALTER PHELPS
vs.
ROWE BROS. } # 1198.

Now come the defendants in the above-entitled cause and move the court to grant them a new trial for the following reasons, to wit:

1. The court erred in the first paragraph of its charge, in this, that it required the defendants at the expiration of the lease to surrender or offer to surrender the possession of the leased premises to the plaintiff, while the proof does not show that the defendants ever at any time since the expiration of said leases excluded or attempted to exclude the plaintiff from the possession of said land.

2. There is no proof in the case as to what the value of the pasturage upon the plaintiff's land was, and the proof clearly showed that the pasturage upon the plaintiff's land was not necessary for the grazing of the stock owned and controlled by the defendants.

3. The court erred in refusing the first special instructions asked by the defendants.

4. The court erred in refusing the second special instructions asked by the defendants.

5. The court erred in refusing the third special instructions requested by the defendants.

6. The court erred in giving the special charge asked by the plaintiff, because the said special charge makes the liability of the defendants depend upon the fact that they had the plaintiff's land enclosed without reference to whether or not it was necessary
28 for the defendants' use and because the proof shows that at the expiration of the leases the lands of the plaintiff and the lands of the defendants were surrounded by a common fence, and that the defendants could not use the lands owned and controlled by them for grazing purposes without their cattle necessarily ranging upon the plaintiff's land.

7. The court erred in refusing to give special instructions No. 4, requested by the defendants, after having given the instructions requested by the plaintiff.

CRAWFORD & CRAWFORD,
Att'ys for Defendants.

The foregoing is endorsed as follows, to wit: No. 1198. Wm. Walter Phelps *vs.* Rowe Bros. (Defendants' motion for a new trial.) Filed June 6, 1890. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

29 WM. WALTER PHELPS
vs.
ROWE BROS. } #1198.

JUNE 6TH, 1890.

On this day came on to be heard the motion of defendants for a new trial herein, and the court, having heard said motion and fully considered the same, is of the opinion that the same is not well taken.

It is therefore ordered that said motion be, and the same is hereby, overruled and refused.

30 In Circuit Court of the United States for the Northern District of Texas, at Dallas, Texas.

WILLIAM WALTER PHELPS
vs.
ROWE BROS. } #1198.

Be it remembered that on the trial of the above-entitled cause it was proved:

First. That on the 22nd day of April, 1887, that the plaintiff became the owner in fee simple of the lands described in his petition through a deed from the New York and Texas Land Co., Limited, and that he has since said date continued to be such owner; that said lands consist of 141 sections of 640 acres each, amounting in the aggregate to 90,240 acres; that on April 15th, 1882, the New York and Texas Land Co., Limited, then the owner of the lands, leased to Alfred Rowe, one of the defendants herein, for the period of five years, 106 sections of said land, and that in January, 1886, said company, being the owner also of same, leased to the firm of Rowe Bros. 18 sections of said land, and that Rowe Bros. afterwards, before its expiration, became the assignee of the first-mentioned lease. The price stipulated in the first lease was at 2 cents per annum, and in the second lease 5 cents per annum. Both leases were in writing and terminated April 14th, 1887. It was stipulated therein that all permanent improvements which might be erected upon the lands by the lessees during their term should at the end thereof remain upon the land and become the property of the lessors.

Second. The defendants were stock-raisers and had their
32 range, prior to the expiration of said lease, in the counties of Gray, Donley, Wheeler, and Collingsworth, Texas, and the same was enclosed by a fence with four wires, which was a protection against the entry of cattle into the said range or pasture. At the time of the expiration of said lease there were about 310,000 acres of land, owned as follows: 90,240 acres by the plaintiff; 74,000 acres owned by the defendants in fee simple, and the remainder of said 310,000 acres belonged to the public free-school fund of the State of Texas. The bulk of the lands of the plaintiff *were* situated on the

east side of the pasture, extending from the north to the south boundary thereof; that about eight sections of land belonging to plaintiff projected into that portion of the pasture where the defendants' lands lay; that said land was surveyed in sections of 640 acres each, the sections belonging to the public free-school fund of the State of Texas alternating with the sections owned by the plaintiff and defendants, as is more fully shown by the map of said lands hereto attached and made a part of this bill of exceptions.

(Here follows map marked p. 31.)

Third. The fences enclosing the lands were built as follows: One line on the south side was erected by Curtiss and Atkinson, who leased from the New York and Texas Land Co., Limited, at the same time lands south of said fence. Said south fence is situated one section—this is, one mile—south of the line of the lands leased by the New York and Texas Land Co., Limited, to the defendants, no part of said fence being on the land leased. This fence was built by Curtiss and Atkinson at the time of their lease, and the said defendants purchased one-half of the same from Curtiss and Atkinson. Said fence, while not situated upon lands embraced in the lease, was still located upon lands which belonged to the plaintiff and partly
33 upon lands which belonged to the State free-school fund, one half of the fence being on school land and the other half on the plaintiff's land. There was no division fence between the land owned by plaintiff and the school land or between the plaintiff's land and the land belonging to defendants. The fence on the east side was built along the line of the land leased by defendants from plaintiff, one half of the fence being on plaintiff's land and the other half on the school land, and the fence or fences on the north and west were built by defendants on their own lands and lands belonging to the public-school fund. All of these fences have been maintained by the defendants since the time of their erection down to the present day, and have been constantly repaired by them, and completely prevent cattle from the outside entering therein or those within from going out. Some time during the continuance of their leases the defendants cut off a portion of the north end of the pasture into what is called a beef or reserve pasture, and in the summer of 1889 they extended this fence, crossing sections 7 and 9, in block 29, which belonged to plaintiff, almost enclosing said section 9 within said beef pasture, which contained about 30,000 acres. No portion of the plaintiff's land was enclosed within said beef pasture except portions of sections 7 and 9, in block 29, and the beef pasture itself was enclosed before the corners of the plaintiff's land had been marked. When the leases expired, April 14th, 1887, the defendants remained in possession of the enclosure with their cattle and continued to maintain the fences without any agreement whatever for the use or occupation. All the land, to wit, 310,000 acres, was surrounded by one common enclosure.

Fourth. Some time in July, 1887, the defendants leased from the State of Texas all of the alternate sections of land belonging

34 to the public free-school fund within said enclosure, which lease has not yet expired, paying a rental to the State annually of four cents per acre for said land.

Fifth. Ira H. Evans was the agent of the New York and Texas Land Co., Limited, and was also the agent of plaintiff after his purchase and is so at the present time. He was absent from the State at the time of plaintiff's purchase and at the time of the expiration of defendants' lease, and had no negotiations with defendants, because it was not known whether the owner, the plaintiff, would sell the lands or offer them for lease. Learning that the defendants had remained in possession of said lands, Evans instructed his agent, T. D. Hobart, to see Rowe Bros. some time in the fall of 1887, and, if possible, collect rent from them from the time of the expiration of the lease. The said Hobart, on the 24th of June, 1887, was at the headquarters ranch of the defendants in Donley county and within said enclosure, where he saw two of the defendants, Alfred and H. V. Rowe. At the time defendants asked him what course the plaintiff would pursue in regard to leasing lands, and Hobart replied that he had not yet been instructed in regard to the matter. H. V. Rowe then said to him that they would continue to use said lands; that he supposed Mr. Phelps would notify them when he wanted pay for the use of his land. Early in October, 1887, Hobart was again at defendants' headquarters ranch with one E. J. Gereau, another agent of plaintiff. Two of the defendants were present and the question of leasing the lands was again mentioned. Defendants admitted that they were using the lands. Hobart reported this interview to Evans. On the 26th day of January, 1888, he met

35 H. V. Rowe at Mobeetie, in Wheeler county, and talked with him in regard to leasing said lands, and was informed that plaintiff would execute a lease to them for said lands at the rate of four cents per acre per annum, said lease to date from the expiration of their former lease, which expired April 14th, 1887. H. V. Rowe replied that they were willing to do what was fair and right in this matter, but thought it would be difficult for them to raise the money, etc., and spoke of giving a note for the rent of the land. He also said that plaintiff ought not to charge them more than two cents per acre from the 15th of April, 1887, to the 1st of January, 1888; but from that time they would be willing to pay four cents an acre per annum for the use of the land. Hobart replied that he would submit his proposition to Ira H. Evans and inform them of his decision, which he did, and then wrote the following letter to the defendants after hearing from Evans:

"MOBEETIE, TEXAS, *February 17th*, 1888.

"Messrs. Rowe Bros., Mobeetie, Texas.

"DEAR SIRS: I submitted to Ira H. Evans the proposition made by one of your firm about leasing the H. & G. N. Railroad surveys in your ranch, but he replied he could see no good reason why he should not receive the same rate as charged by the State, and that he would expect the same from the expiration of your former lease.

"Yours truly, T. D. HOBART."

To this letter he received the following reply:

"FORT ELLIOT, TEXAS, *March* 11, 1888.

"Mr. T. D. Hobart, Mobeetie, Texas.

"SIR: I received a letter from you a couple of weeks ago and did not answer it, as I expected to be here nearly as soon as a letter could reach you, but my return journey was unexpectedly delayed until now. I called at your office to-day, but you were not in. I am writing to Mr. Evans about the lease of the land. Please address any further letters to us to Clarendon, Texas, which
36 will be our only post office from now on.

"Yours truly, H. V. ROWE."

The defendants then had correspondence with Ira H. Evans as follows:

"MOBEETIE, TEXAS, *March* 14, 1888.

"Ira H. Evans, Esq., president of the N. Y. & T. Land Co., Austin, Texas.

"DEAR SIR: The writer's absence from home is the reason of the delay in answering your last communication, addressed through Mr. Hobart. In regard to the leasing of the lands in Collingsworth county, etc., we should like to have at least as favorable terms as those of the lease you have given to Messrs. Coleman & Bugbee, viz., a lease for two years from Sept. 7, 1887, at 4 cents p. acre, and we can see no reason why we should not be treated as well, especially as they have had a whole year's grazing without paying anything. Please reply to Clarendon, which will be our P. O. for the future, and oblige,

"Yours truly, ROWE BROS."

"AUSTIN, TEXAS, *March* 17, 1888.

"Messrs. Rowe Bros., Clarendon, Texas.

"DEAR SIRS: I have at hand your favor of the 14th inst., touching the lands formerly leased by you from the New York and Texas Land Co., Limited, and which you have continued to use without any adjustment of the question of rental. Relative to your suggestion that we should give you at least as favorable terms as those of the lease you have given to Messrs. Coleman & Bigbee—viz., a lease for two years from Sept. 7, 1887, at 4 cents per acre, and saying you could see no reason why you should not be treated as well—I have to say in reply that you seem to be ignorant of the conditions connected with the former lease made by the N. Y. & T. L. Co., L't'd, to Mr. L. G. Coleman. Mr Coleman has a lease for ten years, running from Nov. 1, 1881, to Oct. 30, 1891, with the conditions annexed that he should fence the land, and that the fence and all the improvements on our land should become the property of
37 this company upon the expiration of the lease; Provided, however, that we should have the right to cancel the lease at the end of five years by paying to Mr. Coleman the value of the fences then standing on the lands leased by him. We cancelled the

lease upon the expiration of the five years, and therefore became liable to pay for fences in question.

Not desiring to purchase the fence, we compromised with Messrs. Bugbee and Coleman by allowing them to retain the ownership of the fence, and in consideration of this adjustment we granted them the free use of the land in question until Sept. 2, 1887. You will therefore see that there is no similarity whatever between your lease and that originally made to Mr. L. G. Coleman. Referring to your two leases with the N. Y. & T. L. Co., L't'd, which expired April 14, 1887, I have to say that the fence and all improvements placed upon our lands become our property upon the expiration of your leases, and such fences and improvements on the lands leased from the N. Y. & T. L. Co., L't'd, are the property of Mr. Phelps to-day. There is no reason that I can see why you should not pay Mr. Phelps the rental of 4 cents per acre per annum for the said lands from April 15, 1887, and it is made my duty to collect this rental from you. It is certainly time that this matter is settled between us, and I do not see that we can postpone a settlement of it any longer. By reference to the records of the State land department, it appears that your lease with the State comes south 2 miles further than did your former lease with the N. Y. & T. L. Co., L't'd. I take it that your fence is built on the line of the lease with the State. Is this so? And that your fence lines correspond with the land lines, as given on the enclosed sketch, which is in accordance with your application to lease lands from the State. How long has your fence been built on this line, or is it situated differently from the outlines of this sketch? Please give us definite information
38 as to where your fence lines are. For the purpose of making an immediate settlement of this question I will accept from you rental at the rate of 3 cents per acre per annum from April 15, 1887, for the year ending April 14, 1888, and if you will promptly remit me the amount due at this rate I will send you a full receipt therefor. I will then make you a new lease for the term of two years from April 15, 1888, with a clause in the lease as follows: 'It is also agreed by and between the parties that this lease is made subject to the right of the lessor to sell and deliver to the purchaser possession of any of the land included in this lease upon condition that the lessees shall have a *pro rata* credit upon their next year's rent, or the money refunded to them, as they may elect.' We put this clause in all of our Pan Handle leases, and, as you know, the State reserves the same right. Please give this matter your prompt attention and oblige,

"Yours very truly, IRA H. EVANS,
Agent & Attorney-in-Fact."

"CLARENDON, *March* 26, 1888.

"Ira H. Evans, Esq., Austin, Texas.

"DEAR SIR: I have sent to New York to my brother, Alfred Rowe, the contents of your letter of the 17th inst., and will communicate with you in a few days.

"Yours respectfully, H. V. ROWE."

"CLARENDON, TEXAS, *April* 13, 1888.

"Ira H. Evans, Esq., agent for W. W. Phelps, Austin, Texas.

"DEAR SIR: We have your favor of March 17 to reply to and cannot allow that you have any claim whatever on us for back rent on lands formerly leased through you from the New York and Texas Land Co., Limited. We are sorry that we cannot define the fence lines you speak of with sufficient accuracy to be of any use to you.

We have duly considered the matter of the lease you speak
39 of, and will say that if you are willing to give us a lease of the lands you formerly leased to us and now the property of Mr. Phelps, for a term of 2 years, at two (2) cents per acre per annum, subject to the conditions you mention as to actual settlement, said lease to be terminable at our option on the expiration of our present lease of State school lands, say July 31, 1889, the fences and other improvements where situated on your lands, in consideration of the expense we are at in keeping them up and in repairing and renewing the frequent damage and destruction by fire, etc., to be our property at the termination of the lease, we would be willing to take it.

"We are, dear sir,

"Yours truly, ROWE BROS."

"AUSTIN, TEXAS, *May* 4, 1888.

"Messrs. Rowe Bros., Clarendon, Texas.

"DEAR SIRS: Owing to absence from Austin, I have not sooner been able to give attention to your letter of the 13th ult., in which you advise me that you 'cannot allow' that Mr. Phelps has any claim whatever on you for back rent on lands formerly leased by you from the New York and Texas Land Co., Limited, and offering to lease the lands in question for a term of four years, at two cents per acre per annum, with certain other privileges in your favor, including the ownership by you of the fences of the lands at the termination of the lease, you to say when the lease should terminate, at your pleasure. In reply, I have to say that when your lease with the New York and Texas Land Co., Limited, expired Mr. Phelps was the owner of the lands in question, and as such became the owner of the fences and other improvements situated on the surveys formerly leased by you from the N. Y. & T. L. Co., L't'd. Your former leases expired on April 14, 1887. I beg to advise you that all propositions heretofore made you by me on behalf of Mr. Phelps

I hereby withdraw, and that we will endeavor, through the
40 U. S. courts, to convince you that Mr. Phelps has a very substantial claim for rental from you from April 14, 1887, at not less than four cents per acre per annum. I also beg to advise you that we shall hold you responsible for the value of any fences or improvements removed by you from any of these surveys, or which may have been destroyed through your action or negligence.

"Yours truly, IRA H. EVANS,

"*Agent & Attorney-in-Fact.*"

"CLARENDON, TEXAS, *May* 13, 1888.

"Ira H. Evans, Esq., Austin, Texas.

"DEAR SIR: We have your favor of May 4th last to hand. We are sorry we cannot adjust our little differences without having recourse to a court of law, before which we are perfectly prepared to try the issues. We fully realize, and have always realized, that fact, that the fences and other improvements placed on your lands during our tenure of lease became the property of the land-owner at the termination of the lease, and have acted accordingly. Any fences or other improvements built by us on your lands are intact as the day they were put there. If all of your tenants take as good care of your property, including the prevention of cutting of timber, etc., as we have, you have good cause to congratulate yourself. Our remarks as to improvements becoming our property on termination of a new lease had reference more especially to any new fences that might be built or possibly wind-mills that might be erected, by which means the grazing capacity of a range might probably be doubled, for, as you know, these short leases offer no inducement whatever to improvement nor render any return on the outlay of capital possible.

"We are, sir, yours truly, ROWE BROS."

"MOBEETIE, TEXAS, *March* 24, 1885.

"Ira H. Evans, Esq., Austin, Texas.

"DEAR SIR: In payment of our lease (Alfred Rowe) of your lands in Collingsworth and Donley Cos.—say, $1,356.80, due 13th April, and of the transferred lease of J. F. Evans & Co., in Donley county, $230.40—we beg to hand you herewith a New York draft for $1,587.20 (fifteen hundred and eighty-seven $\frac{20}{100}$), receipt of which please acknowledge.

'We are, dear sir, yours truly, ROWE BROS."

41

"MOBEETIE, TEXAS, *M'ch* 26, 1886.

"Ira H. Evans, Esq., president New York and Texas Land Co., Austin, Texas.

"DEAR SIR: We beg to advise you that we have this day instructed the Bank of Kansas City, Kansas City, Mo., to forward you N. Y. draft, value $1,932.80, in payment of our leases on lands in Donley and Collingsworth counties, due April 15th next. When you receive the amount, please acknowledge receipt to us and oblige,

"Yours truly, ROWE BROS."

A. E. GERAND, on behalf of the pl't'f, testified that in October, 1887, acting under instructions from Ira H. Evans, he and Hobart were at Rowe Bros.' headquarters, situated in the pasture enclosing the lands in controversy. Two of def's, Alfred and H. V. Rowe, were present and the question of re-leasing the lands were discussed. They were perfectly willing to re-lease and admitted that they were

using the lands. The witness was not authorized to lease to them and simply reported the fact to Evans at Austin, Texas. On May 1st, 1888, H. V. Rowe called on the witness at Mobeetie with respect to the rental of lands. He admitted that they were deriving as much benefit from the land as if they had it leased, and that they did not propose to pay the same as they paid the State. Witness suggested that if they did not lease from pl't'ff that he might lease to other parties and turn the cattle into their pasture, to which Rowe promptly replied that in such event they would pull up the fence on the State sections and fence their extreme western boundary,
cutting off pl't'ff's land from their individual land, and turn
42 enough cattle on the outside to graze on the lands leased by
them from the State and on the pl't'ff's land. He stated further that, having leased the lands alternating with pl't'ff's three months after the expiration of their lease, they could not be held responsible for grazing on pl't'ff's land, and having that much advantage of pl't'ff they proposed to hold it and disgorge nothing. They desired to make an arrangement for the future on the terms of 2 cts. per acre for 3 or 4 years and the surrender by pl't'ff of his portion of the fences to them at the expiration of that time. He stated, furthermore, that they were compelled to lease the State lands at the point of a pistol, metaphorically speaking, and that they did not consider that they were compelled to pay individuals for their land at the rate paid the State; that they paid the State more than the land was worth, and that individuals would have to bear the burden of what they considered the State's overcharge; that the pl't'ff's demand on them was for about $3,000.00 and they would rather spend that amount fighting the case than to pay it to the pl't'ff.

The pl't'ff also introduced evidence to show that the land within the enclosure had been overstocked by cattle in the years 1887 and 1888; that much of the grass had been stamped out and the land had grown up in weeds, and that, in addition to the grazing, *that* damage was done to the land from that fact.

The pl't'ff also introduced evidence tending to show that the land within the enclosure had been overstocked by cattle in the years 1887 and 1888.

The pl't'ff also introduced evidence tending to show that the def's
had in said enclosure from April 14th, 1887, to the time of
43 trial, on an average of from twelve to fourteen thousand
head of cattle belonging to def's and about 300 head of horses; also that pl't'ff kept within said enclosure for one Bugbee, of Kansas City, during a portion of 1887 and 1888, about 4,000 head of cattle; also that they kept 750 head of cattle in said pasture for O. H. Nelson from 1887 up to the time of trial; also that the different employees of def't on the range had together about 1,000 head of cattle in the range during said time; also that they had in said pasture for Julius Strauss, during the years 1887 and 1888 and 1889, about 500 head of cattle; also that they had for 5 months in 1888 about 500 head of cattle belonging to Jno. Pope, and that for said pasturing and taking care of these cattle the

Rowe Bros. received from the different parties compensation at the rate of from $1.50 to $1.75 per head per annum.

Pl't'ff also introduced evidence tending to show that of such lands as are within the said enclosures about 20 acres are required for each head of stock, and that not less than said number of acres would be sufficient ordinarily for their maintenance from year to year.

Pl't'ff offered evidence tending to show that the number of cattle within the said enclosure during the years 1887, 1888, and 1889 were more than could possibly have been maintained by the grass upon the lands owned and leased by def's from the public-school fund, and that the grass upon pl't'ff's land was necessary for their maintenance.

Pl't'ff also introduced evidence tending to show that more stock had been kept on the land than could reasonably graze thereon during said years, and that in 1888, the summer of which
44 was unusually dry, def's had to remove from the pasture about 8,000 head of cattle, which they turned outside upon land belonging to pl't'ff and the public school fund, these lands being in alternate sections and unenclosed.

Pl't'ff also introduced evidence tending to show that in addition to the fences completely enclosing the lands of the pl't'ff in connection with those owned and leased by the def's from the State that def's built and used one water tank upon a section of pl't'ff's land; that they built corrals or stock-pens on sections 9, 51, and 125, in block 22, which they continued to use up to the time of trial, and that they enclosed five or six hundred acres of land, a large portion of which was on section 115, in block 21, belonging to pl't'ff. This land was kept for a hay-field, and hay was annually cut for the consumption of the cattle. The def's have remained in the possession and use of the hay-field up to the time of trial, but there was nothing to indicate the amount of hay cut upon said land. It was proved and admitted that after the expiration of def's leases from the New York and Texas Land Co., Limited, that the pl't'ff's agent offered to lease the lands within the enclosure to one Bugbee, and also to one Nelson, both of whom declined to lease them. This offer was made in the year of 1888.

It was shown that the pl't'ff lived in New Jersey and owned no cattle which he could turn into said enclosure. There was no evidence that the pl't'ff at any time demanded possession of his lands or demanded the right to turn cattle into the enclosure. There was no evidence that the def's at any time after the expiration of the leases above mentioned denied the pl't'ff's right to turn cattle into said enclosure or to release the lands to any one whom he pleased.

45 It was proved that the rental value of the land was 4 cts. per acre.

It was admitted upon the trial by the defendants, as witnesses, that they had to lease the State school lands in order to obtain exclusive use of the lands owned by themselves in fee simple, alternating therewith. If they had not done so they would have to

remove their fences and throw their lands open as if they were common.

The def's, to maintain the issue upon their part, introduced evidence tending to show that they at no time asserted any right to keep the lands to the exclusion of the pl't'ff, and that they had been at all times willing for the pl't'ff to lease his lands to any person to whom he might see fit, and so notified pl't'ff's agent, and that they had never at any time denied pl't'ff or his agents the right to use said lands or to turn cattle into said common enclosure. There was no evidence that the pl't'ff at any time demanded possession of his lands or demanded the right to turn cattle into the enclosure.

The def's, to further maintain the issue upon their part, introduced evidence tending to show that a severe drought visited the section of the country in which the pasture is located in the summer of 1888, and that they turned out of the pasture about 2,000 head of their own cattle and about 4,000 head which they were grazing for other parties.

The testimony on the part of the def's further tended to show that the def's kept within said enclosure from ten to twelve thousand head of cattle belonging to themselves, and that in 1887, during September, they received from one Bugbee 4,000 head of cattle, which were kept in the range until the following May, when about
46 2,000 were turned outside and delivered to the owner, and in September following the remainder of said cattle were delivered to the owner and removed from the pasture; that in June, 1888, they received from one Creswell about 4,000 head of cattle to be pastured; that these cattle were retained in the pasture for about two months, when they were delivered outside the pasture to the owner.

That def's also pastured for other persons about 2,000 head of cattle for various lengths of time. They received for pasturage from $1.25 to $1.75 per head per annum. In addition to grazing the cattle, the def's were required to deliver the cattle to the owners outside the pasture and at the shipping station on the railroad, and it was impossible to say just how much of the money received was actually earned by pasturage and how much was earned by the care, attention to, and delivery of the cattle.

The def's also introduced evidence tending to show that at no time since the expiration of the leases, to wit, April 14th, 1887, did the def's have, belonging to themselves and those belonging to other people, a greater number of cattle in the pasture than could be pastured upon the lands belonging to def's and the lands they had leased from the State of Texas without reference to the lands of the pl't'ff.

The def's introduced evidence tending to show that the pasture, including the pl't'ff's lands, would at all times have afforded pasturage for from five to fifteen thousand head of cattle over and above those owned and controlled by the def's.

The def's also introduced evidence tending to show that 10 acres of the land was sufficient to graze one head of cattle, and that in

making this estimate sucking calves were not taken into the account.

47 The def's also introduced evidence tending to show that at no time was it necessary to use the land of the pl't'ff for pasturage, and that the land owned by themselves and leased from the State of Texas and enclosed in such pasture was amply sufficient to accommodate all of the cattle owned and controlled by them, and that at no time was the pasture overstocked.

The fence enclosing the pasture is indicated by the red lines on the diagram or map of the land attached to this bill of exceptions. This fence has been kept up by def's since the expiration of the leases, and in no other way than by having their cattle and those controlled by them in said enclosure did the def's ever exclude the pl't'ff's or any other person's or persons' cattle or stock from said enclosure or from any use of the pl't'ff's land.

After the expiration of the leases negotiations looking to a re-lease of the lands failed, and the def's have not leased the lands or held them as pl't'ff's tenants.

Def's have at no time denied the pl't'ff's right to use his land or turn cattle into the common enclosure. There was no evidence that the pl't'ff at any time demanded possession of his land or demanded the right to turn cattle into the common enclosure.

In this state of the proof the def's requested the court to charge the jury as follows:

1st special instructions.—"To entitle the pl't'ff to recover in this action you must believe from the evidence that the pl't'ff's lands were fenced from those leased and owned by def's, and if there was a common enclosure around the lands of the pl't'ff and the lands owned and leased by the def's, and there were no fences separating the lands of the p'l't'ff from the lands owned and leased by the def's, then the pl't'ff cannot recover."

48 But the court refused to give said instructions and the def's then and there excepted.

The def's also requested the court to charge as follows:

"You are instructed that upon the expiration of the leases from the New York and Texas Land Co., Limited, to Alfred Rowe, the fences enclosing the pasture became the common property of the New York and Texas Land Co., Limited, and Rowe Bros.; that when the pl't'ff bought the land from the New York and Texas Land Co., Limited, the fences became the property of the pl't'ff and def's. So long as Rowe Bros. remained in the sole possession of the pasture, the pl't'ff making no demand to be admitted to the joint possession of the pasture with them, it was the duty of Rowe Bros. to keep the common or party fences in repair, and the fact that they did so will not of itself furnish evidence of an exclusion of the pl't'ff from the exercise of his right of joint occupancy of the pasture with the def's."

But the court refused to give said instructions and the def's then and there excepted.

The def's also requested the court to instruct the jury as follows:

"You are instructed that upon the expiration of the lease from the

New York and Texas Land Co., Limited, to Alfred Rowe (April 14th, 1887) the pl't'ff was entitled to occupy jointly with the def's the pasture which was enclosed by the common fence of the pl't'ff and def's, but this right of the pl'ff to occupy the pasture jointly with the def's did not give the pl't'ff the right to recover of the def's for the use and occupation of the pasture unless there was an express promise made by the def's to pay rent to the pl't'ff or unless the def's took and held exclusive and forcible possession of the pasture after the demand made by the pl't'ff upon the def's
49 to be admitted to enter upon and to the joint use and occupancy of the pasture and to the extent of his interest.

The proof does not show an express promise to pay rent, nor does it show the demand on the part of the pl't'ff to be admitted into the joint possession of the pasture with the def's and a refusal by the def's to so admit the pl't'ff. You are therefore instructed to return your verdict for the def's."

But the court refused so to charge and the def's then and there excepted.

Thereupon the court of its own motion instructed the jury as follows:

"If you believe from the proof in this case that defendants continued, after the expiration of their leases from the grantor of the plaintiff, to use the plaintiff's lands, keeping them fully enclosed and fully stocked with grazing animals, and at first and for some time expressing themselves as willing to pay the reasonable value of said pasture, and that they never at any time changed their manner of use, or in good faith surrendered or offered to surrender to the plaintiff the use of the plaintiff's land, you will find for the plaintiff the reasonable value (as in your view of the proof it is shown to be) of the use for pasturage of the plaintiff's land from the expiration of said leases (14th April, 1887) until the present time (June 3, 1890)."

To which the defendants excepted, 1st, because it authorizes and permits the jury to find a verdict for the plaintiff unless the defendants surrendered or offered to surrender to the plaintiff his land at the expiration of the lease without demand having been made for possession and without the defendants having denied the plaintiff's right to possession or refused to yield up the same;
50 and, 2d, because it authorizes and permits the jury to find a verdict for the plaintiff if the defendants used the common enclosure as they did during the existence of the lease; 3d, because it authorized the jury to find the value of the use of the land for pasturage when there was no proof of the value of the pasturage alone, the proof showing that the rental value of the land was four cents per acre.

At the request of the plaintiff the court instructed the jury as follows:

"It is admitted that plaintiff is the owner of 141 sections of land of 640 acres each, as claimed in this controversy. It is also admitted that defendants held under lease from the grantor of plaintiff 124 sections of said land, which leases expired April 14, 1887.

Under these leases defendants had the right to build fences and other improvements on said leased lands, the ownership of which passed to plaintiff at the expiration of the lease.

The evidence shows, without dispute, that the ranch or range of defendants is enclosed by fences which they have kept up, and some of which are on the lands of plaintiff, and that there are in this enclosure about 74,000 acres which belong to defendants, about 90,240 acres which belong to plaintiff, and about 141,000 acres which belong to the State of Texas and which are under lease to defendants since some time in July, 1887.

The evidence also shows, without dispute, that defendants have kept their cattle and those of others for hire within said inclosure since the expiration of their lease, in April, 1887. Now, if you

51 believe from the evidence that defendants maintained the fences around said enclosure with the intent to control the range therein and to appropriate the grass upon plaintiff's said lands to their exclusive use and benefit, and that they have excluded all others therefrom, and have had and enjoyed the grass upon all of plaintiff's lands, then you will assess the value of the same per annum according to the evidence in the case."

To the giving of the above special charge the defendants excepted:

1st. Because it made the liability of the defendants depend upon the fact that they have since the expiration of the lease maintained and kept up the fences around the pasture, which was the common property of the plaintiff and defendants, and had grazed their herds in the common enclosure without reference to the fact that the defendants might have owned and controlled lands enough in the common enclosure to have pastured all of the cattle owned and controlled by them without reference to the plaintiff's land.

2d. Because the testimony shows that the fence enclosing the land was built in accordance with the terms of the lease under which the defendants held the plaintiff's land, and that the property was so situated *that the property so situated* that the defendants could not lawfully use the land owned by them and leased from the State and prevent their cattle from grazing upon the plaintiff's land.

After the court had given the special instructions requested by the plaintiff the defendants requested the court to give the following special instructions to the jury, to wit:

"You will, under the charge given you at the request of the plain-

52 tiff, not find for the plaintiff unless you believe from the evidence that the grass on the plaintiff's land was necessary during the time for which damages are sought to be recovered for the support of the cattle of the defendants, either owned or pastured by them; and if you believe from the evidence that the defendants owned in their own right and had under lease from the State of Texas enough land reasonably and fairly to furnish pasturage for their own cattle and the cattle of others pastured by them, then you will find for the defendants, although you may believe that the cattle in the pasture ranged indiscriminately over the lands of the plaintiff and the lands owned and leased by the defendants."

But the court refused so to charge; to which refusal the defendants excepted.

And because the above evidences and exceptions do not appear of record I, the judge who tried the above cause, have, at the request of the respective parties, hereunto set my hand and seal this the 9th day of June, A. D. 1890.

A. P. McCORMICK,
U. S. Dist. Judge.

The foregoing is endorsed as follows, to wit: #1198. Wm. W. Phelps *vs.* Rowe Bros. Bill of exceptions. Filed June 9, 1890. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

53 UNITED STATES OF AMERICA, }
Northern District of Texas. }

To the honorable justices of the Supreme Court:

And now comes Alfred Rowe, H. V. Row, and B. D. Rowe, by M. L. Crawford, their attorney, and complain that in the records and proceedings, and also in the rendition of the judgment in the suit between William Walter Phelps, plaintiff, and Alfred Rowe, H. V. Rowe, and B. D. Rowe, defendants, tried in the circuit court of the United States for the northern district of Texas, at Dallas, at the May term thereof, 1890, in which judgment was rendered against them on the 4th day of June, 1890, manifest error hath intervened, to the great damage of your petitioners. Wherefore they pray for the allowance of a writ of error and such other process as may cause the same to be corrected by the supreme court aforesaid.

M. L. CRAWFORD,
Counsel for Petitioners.

Allowed.
A. P. McCORMICK,
U. S. District Judge.

The foregoing is endorsed as follows, to wit: Alfred Rowe, H. V. Rowe, and B. D. Rowe *vs.* William Walter Phelps. Petition for writ of error. Filed June 9, 1890. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

54 In the Supreme Court of the United States.

ALFRED ROWE, H. V. ROWE, and B. D. ROWE, Plaintiffs in Error, }
vs.
WILLIAM WALTER PHELPS, Defendant in Error. }

Know all men by these presents that we, Alfred Rowe, H. V. Rowe, and B. D. Rowe, as principals, and Thos. S. Bugbee, J. S. Chick, and W. J. Anderson, as sureties, are held and firmly bound to William Walter Phelps in the sum of twelve thousand dollars (12,000), to be paid to the said William Walter Phelps, his executors

or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals this the tenth day of June, A. D. 1890.

Whereas the above-named Alfred Rowe, H. V. Rowe, and B. D. Rowe have prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the northern district of Texas, at Dallas, by which judgment said William Walter Phelps recovered against said Alfred Rowe, H. V. Rowe, and B. D. Rowe the sum of $7,739 and all costs of suit, which said judgment was rendered in the circuit court on the 4th day of June, 1890:

Now, therefore, the condition of this obligation is such that if the above-named Alfred Rowe, H. V. Rowe, and B. D. Rowe shall prosecute their said writ of error to effect and answer all costs and
55 damages if they shall fail to make good their said plea, then this obligation to be void; otherwise to remain in full force and virtue.

ALFRED ROWE.	[SEAL.]
H. V. ROWE.	[SEAL.]
B. D. ROWE.	[SEAL.]
THOS. S. BUGBEE.	[SEAL.]
J. S. CHICK.	[SEAL.]
W. J. ANDERSON.	[SEAL.]

The foregoing bond is hereby accepted and approved as a writ of error supersedeas bond in the case described in it.

[SEAL.] A. P. McCORMICK,
U. S. Dist. Judge.

The above-named sureties are personally known to me, and they are amply sufficient to secure the penalty of the bond.

JNO. F. PHILIPS,
U. S. Dist. Judge, Western Dist. Mo.

June 10th, 1890.

The foregoing has the following endorsement, to wit: Alfred Rowe, H. V. Rowe, and B. D. Rowe *vs.* William Walter Phelps. (Writ of error supersedeas bond.) Filed June 9, 1890. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

56 UNITED STATES OF AMERICA, *ss:*

To William Walter Phelps, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington on the 2d Monday in October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the 5th circuit and northern district of Texas, at Dallas, wherein Alfred

Rowe, H. V. Rowe, and B. D. Rowe are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable judge of the district court of the United States for the northern district of Texas, sitting as one of the judges of the circuit court, this the 9 day of June, A. D. 1890.

A. P. McCORMICK,
U. S. District Judge.

Service accepted June 9, 1890.

LEAKE, SHEPARD & MILLER,
Att'ys for W. W. Phelps, Pl'ff.

56½ [Endorsed:] Alfred Rowe, H. V. Rowe, and B. D. Rowe *vs.* William Walter Phelps. (Citation in error.) Filed June 9, 1890. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

57 UNITED STATES OF AMERICA, *ss:*

The President to the honorable judge of the circuit court of the United States for the northern district of Texas, Greeting:

Because there is in the records and process and also in the rendering of judgment in a suit before you or some of you, between Alfred Rowe, H. V. Rowe, and B. D. Rowe, citizens of the State of Texas, plaintiffs in error, and William Walter Phelps, a citizen of the State of New Jersey, defendant in error, a manifest error has intervened, to the great damage of the said plaintiffs in error, as in their complaint has been stated, and as it is just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in this behalf, you are hereby commanded that, if judgment thereof be given, then, under your seal, you do distinctly and openly send the record and process in the suit aforesaid, with all things concerning them, and this writ, so that you have the same before the Chief justice and associate justices of the Supreme Court of the United States on the second Monday in October next, at Washington, being the present site of the National Government, that, the record aforesaid being inspected, they may cause to be done thereupon what of right ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, at Washington aforesaid, this the 9 day of June, in the year of our Lord eighteen hundred and ninety, and the Independence of the United States the 114th.

[The Seal of the U. S. Circuit Court, Northern Dist. Texas, Dallas.]

J. H. FINKS, *Clerk*,
By CHAS. H. LEDNUM, *Deputy*.

57½ [Endorsed:] Alfred Rowe, H. V. Rowe, and B. D. Rowe *vs.* William Walter Phelps. (Writ of error.) Filed June 9, 1890. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

58 *Clerk's Certificate.*

I, J. H. Finks, clerk of the circuit court of the United States within and for the fifth judicial circuit and northern district of Texas, do hereby certify that the above and foregoing is a full, true, and correct transcript of the record in cause numbered 1198, wherein William Walter Phelps is plaintiff and Rowe Brothers are defendants, lately pending in said court, at Dallas, Texas, except that the original writ of and citation in error are included instead of copies thereof.

The Seal of the U. S. Circuit Court, Northern Dist. Texas, Dallas.

In testimony whereof I have hereunto affixed the seal of said court, at Dallas, Texas, and signed the name of the clerk thereof officially on this the 6th day of October, A. D. 1890.

J. H. FINKS,
Clerk of said Circuit Court,
By CHAS. H. LEDNUM, *Deputy.*

Endorsed on cover: N. Texas C. C. U. S. No. 1384. Alfred Rowe, H. V. Rowe, and B. D. Rowe, plaintiffs in error, *vs.* William Walter Phelps. Filed October 11, 1890.

FILED
DEC 26 1893
JAMES H. McKENNEY,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1893.

ALFRED ROWE, H. V. ROWE AND B. D. ROWE,
Plaintiffs in Error.

vs.

WILLIAM WALTER PHELPS,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

M. L. CRAWFORD,
Attorney for Plaintiffs in Error.

John F. Worley, Printer, Dallas, Texas.

In the Supreme Court of the United States

OCTOBER TERM, 1893.

ALFRED ROWE, H. V. ROWE AND B. D. ROWE,
Plaintiffs in Error.

vs.

WILLIAM WALTER PHELPS,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

This suit was instituted by William Walter Phelps against Alfred Rowe, H. V. Rowe and R. D. Rowe in the United States Circuit Court for the Northern District of Texas on Sept. 17, 1888. In an amended original petition filed January 31, 1890, plaintiff Phelps in substance alleges, that on April 15, 1887, he was the owner of and entitled to the possession of one hundred and forty one surveys of land each containing six hundred and forty acres situated in the counties of Gray, Collingsworth, Wheeler and Donley in the State of Texas. That said land formerly belonged to the New York and Texas Land Company, and that while said Land Co. was the owner of the land to wit: April 15, 1882, it leased a large part of it to Alfred Rowe, one of the defendants, for five years ending April 14, 1887. Subsequent to the execution of

said lease the defendants became partners under the name of Rowe Bros. and assumed the said lease. On January 1, 1886, Rowe Bros. leased from the New York and Texas Land Co. the remainder of said land, which lease was also to expire April 14, 1887.

Rowe Bros. were engaged in the business of raising and pasturing horses and cattle, and went into the possession of said land as tenants of the New York and Texas Land Co., paying therefor a rental of two cents per acre, which was all paid to the expiration of the leases to wit: April 14, 1887.

When the leases were executed the land was unenclosed and not otherwise improved, that it was part of the consideration for the leases that the lands were to be fenced and that wind mills, tanks and other improvements useful to the occupant of the land and increasing its rental value should be erected by the tenants, which Rowe Bros. should use without additional charge, but which at the expiration of the leases should become the property of the owner of the land. That said improvements were placed upon the land and its rental value thereby enhanced two cents per acre. That previous to the expiration of said leases the New York and Texas Land Co. had conveyed to said Phelps all the land and improvements and that after the expiration of said leases Rowe Bros. continued to occupy the land and were notified by said Phelps that they must pay a rental of four cents per acre. (Rec. 9–13.)

The defendants answered by a general denial, and that at the date of the expiration of said leases they

owned in fee simple seventy-four thousand acres inclosed in the same pasture with plaintiff's land but in a different portion of the pasture; that in addition to this they had leased from the State of Texas about 150,000 acres, in sections of 640 acres each and most of it alternating with the plaintiff's sections and that they had 2000 acres leased from other parties. (The situation of all the land in the pasture is shown by the map made part of the bill of exceptions R. 16.) At the expiration of the leases some negotiations were had with plaintiff looking to a renewal of the same, but no satisfactory terms could be arrived at and defendants notified plaintiff that he could take possession of the land in accordance with the terms of the lease.

That only about five miles of the fence is on land owned or claimed by plaintiff, and that his right to this and other improvements has never been denied. That at no time since the expiration of the lease have they had in the inclosure more stock than they could graze upon their own land, and that leased from the State; that they have not needed the plaintiff's land and have not withheld it from him. (R. 8-9.)

The case was tried June 4th, 1890, and resulted in a verdict and judgment for the plaintiff for $7739.00. (R. 13.)

The bill of exceptions shows that on April 22, 1887, defendant in error purchased the land, 141 sections, 640 acres each, aggregating 90,240 acres from the New York and Texas Land Company, limited. That on April 15, 1882, the said land company leased to Alfred Rowe 106 sections of the land at two cents per acre; that after-

wards Rowe Bros, became the assignees of said lease and themselves leased eighteen sections from said land company at five cents per acre; both leases expired April 14, 1887. In the leases it was stipulated that all permanent improvements which might be erected by the lessees during the term should at the expiration thereof remain upon the land and become the property of the lessors.

The defendants, Rowe Bros., were stock raisers and their range was enclosed with a fence of four wires, which protected it against the entry of cattle.

When the leases expired there were in the pasture about 310,000 acres, all surrounded by one common inclosure and owned as follows: 90,240 acres by defendant in error, 74,000 acres by Rowe Bros. and the balance by the public free school of the State. In July, 1887, Rowe Bros. leased all of the school land from the State of Texas, which lease had not expired at the date of the trial.

The fence on the south was built by Curtis and Atkinson, lessees of the New York and Texas Land Company. Rowe Bros. purchased one half of this fence from Curtis and Atkinson. No part of this fence was on the land leased by Rowe Bros., but upon lands which belonged to defendant in error and to the school fund. The fence on the east side was built on land leased by Rowe Bros. and the school land. The other fences were built by Rowe Bros. on their own land, and the school land. There were no fences dividing plaintiff's land from defendants, or dividing either from the school land. The defendants cut off a reserve pasture, 30,000 acres in the northern

part of the range, and in doing so built a fence across two sections of plaintiff's land. No other land belonging to plaintiff was inclosed in this reserve pasture. The position of the land and fences is shown by map at page 16, of the record. When the leases expired, April 14, 1887, Rowe Bros. remained in possession of the inclosure with their cattle and continued to maintain the fences without any agreement to pay rent. It was admitted that in 1888, plaintiff offered to lease his lands within the inclosure to one Bugbee and one Nelson.

There was no evidence that plaintiff ever demanded possession of his lands or the right to turn cattle into the inclosure, or that after the expiration of the lease defendants ever denied the plaintiff the right to turn cattle into the inclosure or lease the land to any one to whom he pleased.

This statement from the bill of exceptions states accurately the condition of the property and the situation of the parties at the expiration of the leases, and upon the facts as here stated the plaintiff's right to recover in the Court below depended. Upon the trial defendants asked the Court to instruct the jury that, "To entitle the plaintiff to recover in this action you must believe from the evidence that the plaintiff's lands were fenced from those leased and owned by defendants, and if there was a common inclosure around the lands of the plaintiff, and the lands owned and leased by defendants, and there were no fences separating the lands of the plaintiff from the lands owned and leased by defendants, then the plaintiff cannot recover." But the Court refused said instruction and defendants excepted. (R. 25.)

The rule of the common law making it the duty of the owner of cattle to confine them upon his own land, and making him liable in damages for trespass committed by them upon uninclosed land of another has never been in force in Texas.

In 1840 the congress of the Republic of Texas passed the following act: "Every gardener, farmer or planter shall make a sufficient fence about his cleared land in cultivation at least five feet high, and make such fence sufficiently close to prevent hogs from passing through the same." This has never been repealed. (Rev. Stat. of Texas, Art. 2431.)

"If it shall appear that such fence is insufficient then the owners of such cattle, horses, hogs or other stock shall not be liable to make satisfaction for such damages." Rev. Stat. of Texas, Art 2434.

It is believed that the case of Pace vs. Potter, 84 Tex., 473, is conclusive of this case. The case was before the Court of Civil Appeals, and is reported in 20 Southwestern Reporter, 929. The conclusions of fact, as determined by the Court, are as follows:

1. The Kit Carson Cattle Company, owned a large body of land lying in Motley, Cottle, King and Dickens counties. The plaintiff is the owner of nine sections of land for the use and occupation for which he brings this suit. The plaintiff's land lies immediately west of the Kit Carson Cattle Company's lands and adjoins it.

2. The parties pasturing the land contiguous to the plaintiff's, and the Kit Carson Cattle Company's land, in inclosing their lands for a pasture, built a line of fence on the east, north, west, and south of the plaintiff's land

and the Kit Carson Cattle Company's land. The lines of fence thus constructed connected with each other and the lands of plaintiff and the Cattle Company's were thus inclosed in one common inclosure.

3. Plaintiff built none of this fence and had no interest in it, nor did he known that his land was inclosed until shortly after the bringing of this suit.

4. The Kit Carson Cattle Company built none and had no interest in it, except a half interest in about a mile on the south side of the land, and on the south side of that portion of the same afterwards sold to Pace as below stated.

5. The Kit Carson Cattle Company used the lands within its inclosure, including the land of plaintiff, until July, 1888.

6. At this date the Kit Carson Cattle Company sold to the defendant about 41,000 acres off the west side of its land.

7. At the time of this sale the Kit Carson Cattle Company built a fence north and south on and along the east line of the 41,000 acres sold to defendant. The balance of the cattle company's land was thus separated from the portion sold to the defendant. The plaintiff's land and the defendant's land was thus left in a common inclosure.

8. The partition fence thus constructed was built at the *instance* of the *defendant* and for *him* as a *part* of the *inducements* to the sale by the Kit Carson Cattle Company to *him*.

9. From the date of the sale in July, 1888, until March, 1889, the plaintiff's nine sections of land were in

the enclosure of the defendant, and the defendant used this inclosure for the purpose of pasturing his stock. In March, 1889, defendant separated his land from that of the plaintiff by building a fence between them.

As a conclusion of law the Court said: "Under the foregoing facts we are of opinion that the defendant must be held from the time of the construction of the fence on the east line of his land in July, 1888, until the erection of the fence on the west line of his land in March, 1889, to have taken exclusive possession of plaintiff's lands and to have appropriated them to his own use and that for this use he should be held liable as adjudged by the Court below."

By writ of error this case was taken to the Supreme Court of the State where the judgment of the Court of Civil Appeals was reversed and judgment rendered for the defendant.

The Court held that the conclusions of fact as found by the Court of Civil Appeals did not warrant their conclusion of law that the defendant had taken exclusive possession of the plaintiff's land.

The Court further held that after the building of the fence in July, 1888, by which the plaintiff's land and that of the defendant was thrown into one common inclosure if the plaintiff desired to protect his lands from defendants' cattle, he must fence it off. That defendant was not liable to the plaintiff before he built the fence in March, 1889, and that he was under no obligation to build it. The Court further held that each party had the right to put his own cattle upon his own land within the general inclosure, and as to the cattle owned by

either party the land of the other inside the common inclosure must be regarded as unfenced.

Pace vs. Potter, 85 Tex., 475.
Buford vs. Hontz, 133 U. S., 320.

The defendants requested the Court in substance, to instruct the jury: That upon the expiration of the leases to Rowe Bros. and the purchase of the leased land by the plaintiff that the fences became the property of Rowe Bros. and plaintiff, and so long as Rowe Bros. remained in the sole possession of the pasture, the plaintiff making no demand to be admitted to the joint possession with them, it was the duty of Rowe Bros. to keep the common fences in repair and the fact that they did so will not of itself furnish evidence of an exclusion of the plaintiff from the exercise of his right of joint occupancy of the pasture with the defendants, but the Court refused so to charge and defendant excepted. (Rec. 25.) The bill of exceptions shows that the fence as shown on the map had since the expiration of the leases been kept up by the defendants, and in no other way than by having their cattle and those controlled by them in said inclosure did the defendant ever exclude the plaintiff or any other person or person's cattle from said inclosure or from the use of the plaintiff's land.

Defendants at no time denied plaintiff's right to use his land or turn cattle into the common inclosure. Neither did the plaintiff at any time demand to do either. (Rec. 25.) By counting the number of sections through which the common fence runs it will be seen that the fence is about one hundred miles long, but five

miles of this is upon land (colored blue) leased by Rowe Bros. from the New York and Texas Land Company and owned by the plaintiff Phelps. By the terms of the leases, no part of the fence became the property of plaintiff except this five miles. At the termination of the leases Rowe Bros. and the plaintiff became tenants in common of the fence. Each had a beneficial interest in the whole fence and neither had the right to remove or destroy it.

Freeman Co-tenancy and Partition, 2d Ed., Sec. 97a.

It is true Mr. Freeman is speaking of partition fences, but the same rule applies to outside fences where the land inclosed belongs to different proprietors, and it is not only the right but the duty of any one of the proprietors to repair the common fence, although no part of the fence repaired is on the land of the proprietor making such repairs.

In Stoner vs. Shugart, 45 Ill., fo. 78, the Court says: "But as the fields of plaintiff in error and Mrs. Epperson were in common, her north fence was practically his outside fence and he should have seen that it was sufficient to turn ordinary stock if he desired to hold persons liable for the trespass of their animals."

The leases to Rowe Bros. stipulated that the permanent improvements should *remain* upon the land and become the property of the lessors at the expiration of the term. If there could be a doubt as to the right of Rowe Bros. to repair and maintain the fences prior to July 4, 1887, there can be none after that date. On March 17, 1887, the Legislature passed the following act: Hereafter it shall be unlawful for any person who is at

joint owner of any separating or dividing fence, or who is in any manner interested in any fence attached to or connected with any fence owned or controlled by any other person to remove the same except by mutual consent or as hereinafter provided."

Acts 20th Leg. Sec. 1, fo. 30.
Sayles' Texas Civil Statutes, Art. 2435*b*.

The second Section of the Act requires six months written notice of an intention to change the fence. A violation of the provisions of the Act subjects the offender to a fine of not less than ten nor more than fifty dollars for each offence and makes every ten days a separate offence.

Sayles' Civil Statutes Tex., Art. 2435*b*, Sec. 2.

General laws go into effect ninety days after the adjournment of the Legislature. (Con. Tex. Art. 2, Sec. 39.) The 20th Legislature adjourned April 4th, 1887. When the leases expired plaintiff and his agent, Ira H. Evans, were both absent from the State and it was not known whether plaintiff desired to lease his lands or sell them. (Rec. 17.)

The defendants requested the Court in substance, to instruct the jury: That upon the expiration of the leases to Rowe Bros. plaintiff was entitled to occupy jointly with them the pasture inclosed by the common fence, but that this did not give plaintiff the right to recover for the use and occupation of the pasture unless there was an express promise to pay rent or unless Rowe Bros. had taken and held exclusive and forcible posses-

sion of the pasture after demand by plaintiff to be admitted into joint possession, and the proof failing to show such demand and refusal that they must find for defendants, but the court refused so to charge and defendant excepted. (Rec. 25-26.)

Upon the expiration of the leases the lessor had the right to re-enter the demised lands, and it nowhere appears that this right was ever denied or disputed by the lessees. The plaintiff became the owner of the land on the 22d of April, 1887, (Rec. 15) and he then had the same right. He might occupy the lands or lease them, and he did endeavor to lease the land to Bugbee and to (Nelson. Rec. 23.)

The Court upon its own motion instructed the jury, in substance, that if after the expiration of the leases Rowe Bros. continued to use the plaintiff's land; keeping them fully inclosed and fully stocked with grazing animals and for some time expressed a willingness to pay the reasonable value of the pasture, and never at any time changed their manner of use, or in good faith surrendered or offered to surrender to the plaintiff the use of the land, they must find for plaintiff the value of the use of the land for pasturage from April 14, 1887, to the present time. (Rec. 26.)

Defendants excepted to this instruction—1st, because it authorized the jury to find for plaintiff, unless the defendants had, at the expiration of the leases, surrendered possession of the lands without demand having been made therefor, when defendants had never denied plaintiff's right to possession or refused to yield up the same; 2nd, it authorized the jury to

find for plaintiff if defendants, after the expiration of the leases, used the common inclosure, as they did during the term. (R. 26.)

This pasture contained 310,000 acres, 90,000 belonging to the plaintiff, the balance either owned or controlled by defendants, all the fence, except about five miles, belonged to the defendants. They certainly were under no obligation to drive their cattle out of the pasture and abondon it because they could not agree with the plaintiff for a renewal of the lease.

The witness Gerand testified that under instructions from Ira H. Evans, plaintiff's agent, in October, 1888, he went to the pasture and suggested to Rowe Bros. that unless they leased the land from plaintiff he might lease it to other parties and turn their cattle into their pasture. The plaintiff's right to do this was conceded. (R. 23.)

At the request of plaintiff the Court, after stating the facts, instructed the jury, that if defendants maintained the fences around the inclosure, with the intent to control the range and appropriate the grass upon plaintiff's land to their exclusive use, and that they have excluded all others therefrom, and have had and enjoyed the grass upon all of plaintiff's land, they would assess the value of the same, per annum, as the proof showed to be. (R. 27.) To this defendants excepted. 1st. Because it made defendants liability depend upon the fact that they had kept up the fences and grazed their cattle in the common inclosure, without reference to the fact that they might have owned or controlled land enough in the pasture to graze all their cattle without reference to plaintiff's land; 2nd, because the property

was so situated that defendants could not lawfully use the land owned by them and leased from the State and prevent their cattle from grazing upon plaintiff's land. (R. 27.)

After the Court had given this special instruction the defendants requested the Court to charge the jury in substance, that under the instructions given they could not find for the plaintiff if the defendants had in the pasture no more cattle than could be grazed upon the land owned by them and leased from the state without reference to plaintiff's land, but the Court refused so to charge and the defendants excepted. (R. 27.) This charge should have been given, the defendants having introduced evidence tending to show that at no time since the expiration of the leases did they have in the pasture a greater number of cattle than could be pastured upon the land owned by them and leased from the State without reference to plaintiff's land. (R. 24.)

It is respectfully submitted that no right of the plaintiff has been violated. Upon the termination of the leases he was entitled to the possession of the premises, leased by the New York and Texas Land Company to Rowe Bros., but he was entitled to nothing more, and this right he never attempted to assert. He could, at any time, by himself, his agents, or tenants, have taken possession of the land or turned cattle into the common inclosure. By an act of the legislature, passed February, 1884, no one could build or maintain a fence more than three miles in length without providing a gateway every three miles, which gate must not be locked, and a violation of the provisions of this act sub-

jects the offender to fine of one hundred dollars per day.

Sayles' Civil Statutes Texas, Art. 2435a.

As to defendants' cattle, the lands of plaintiff within the common inclosure must be treated as unfenced. This is expressly decided in Pace vs. Potter *supra*. If this case decided nothing but this one proposition the rule announced by this Court, in Buford vs. Houtz, 133 U. S., would entitle the defendant to a verdict. But the facts in this case are substantially the same as the facts in Pace vs. Potter. And this last case is conclusive.

I respecfully ask that for the errors pointed out the judgment be reversed and the cause remanded.

M. L. CRAWFORD,
Attorney for Plaintiffs in Error.

JAN 19 1894
JAMES H. McKENNEY,
CLE

Supreme Court of the United States.

OCTOBER TERM, 1893.

No. 237.

ALFRED H. V. ROWE AND B. D. ROWE, PLAINTIFFS IN ERROR,

vs.

WILLIAM WALTER PHELPS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

BRIEF OF DEFENDANT IN ERROR.

LEAKE, HENRY & REEVES,
LEIGH ROBINSON,
For Defendant in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

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BRIEF OF DEFENDANT IN ERROR.

I.

The bill of exceptions shows that on the 22d day of April, 1887, the plaintiff in the court below and defendant in error here became the owner in fee simple of 141 sections of land, aggregating 90,240 acres; that on April 15, 1882, the New York and Texas Land Company, Limited, from whom the defendant in error bought, leased to Alfred Rowe, one of the defendants in the court below and one of the plaintiffs in error here, for the period of five years, 106 sections of said land, and that in January, 1886, said company

being the owner also of the same, leased to the firm of Rowe Brothers 18 sections of said land, and that Rowe Brothers afterwards, before its expiration, became the assignees of the first-mentioned lease. The price stipulated in the first lease was at 2 cents per acre per annum and in the second lease 5 cents per acre per annum. Both leases were in writing and terminated April 14, 1887. It was stipulated that all permanent improvements which might be erected upon the lands by the lessees during their term should, at the end thereof, remain upon the land and become the property of the lessors. At the time of the expiration of the lease there were about 310,000 acres of land (in one common inclosure), owned as follows: 90,240 acres by the plaintiff (defendant in error here), 74,000 acres owned by the defendants (plaintiffs in error here) in fee simple, and the balance belonging to the school fund of Texas. (Record, p. 15)

The lands were fenced as follows: The line on the south side by Curtiss & Atkinson, who leased from the New York and Texas Land Company, Limited, lands south of the fence, said line of fence being one mile south of the lands leased by the same company to the defendants. The defendants (plaintiffs in error) purchased from Curtiss & Atkinson one-half of this fence, which, although not upon lands embraced in the lease, was upon lands which belonged to the plaintiff (defendant in error) and partly upon lands belonging to the school fund—one-half on the school land and one-half on plaintiff's. There was no division fence between the school land and plaintiff's or between plaintiff's and that belonging to defendants. The fence on the east side was built by defendants along the line of land leased by them from plaintiff and that on the north on their own land, said fences being in each case alternately on private land and that belonging to the school fund. All of these fences had been continuously maintained and constantly repaired by defendants (plaintiffs in error), and completely prevent the intrusion of cattle from without or

their escape from within. As has been stated, all the land, to wit, 310,000 acres, was surrounded by one common inclosure. When the leases expired, April 14, 1887, the defendants remained in possession of the inclosure with their cattle and continued to maintain the fences, although without any express agreement for the use and occupation. During the continuance of their lease the defendants (plaintiffs in error) cut off a portion, 30,000 acres, at the north end to form a beef or reserve pasture, and in the summer of 1889 they extended this fence, crossing sections 7 and 9, block 29, belonging to plaintiff (defendant in error), and almost completely inclosing the latter. In July, 1887, the defendants leased from the State of Texas the alternate sections of land belonging to the public free-school fund within said inclosure, paying an annual rent therefor of 4 cents per acre. (*Id.*, p. 16.)

Ira H. Evans, who had been the agent of the New York and Texas Land Company, Limited, continued to act as agent of the plaintiff after the purchase by the latter, but was absent from the State at the time of said purchase and at the time of the expiration of the lease; but, upon learning that Rowe Brothers had remained in possession of the lands, Evans instructed his agent, Hobart, to collect rent from them from the time of the expiration of the lease. The said Hobart, on the 24th of June, 1887, saw two of the defendants, Alfred and H. V. Rowe. "At the time defendants asked him what course the plaintiff would pursue in regard to leasing lands, and Hobart replied that he had not yet been instructed in regard to the matter. *H. V. Rowe then said to him that they would continue to use said lands; that he supposed Mr. Phelps would notify them when he wanted pay for the use of his land.*" Early in October, 1887, the question of leasing the lands was again mentioned. Defendants admitted they were using the lands. Hobart reported this interview to Evans. On the 26th day of January, 1888, he met H. V. Rowe at Mobeetie, in Wheeler

county, and talked with him in regard to leasing said lands, and was informed (*i. e.*, Rowe was informed) "*that plaintiff would execute a lease to them for said lands at the rate of* 4 *cents per acre per annum, said lease to date from the expiration of their former lease, which expired April* 14, 1887. *H. V. Rowe replied that they were willing to do what was fair and right in this matter, but thought it would be difficult for them to raise the money, &c., and spoke of giving a note for the rent of the land. He also said that plaintiff ought not to charge them more than* 2 *cents per acre, from the* 15*th of April,* 1887 *to the* 1*st of January,* 1888, *but from that time they would be willing to pay* 4 *cents per annum for the use of the land.*" (*Id.*, p. 17.)

The plaintiff "could see no good reason why he should not receive the same rate as charged by the State" for the whole period (*id*). The opposing theories of appropriate compensation were debated in writing (*id.*, pp. 18, 19, 20), the upshot of the matter being that Mr. Phelps decided to submit to the court the justice of his own claim. (*Id.*, p. 20.)

In a letter to Hobart of March 11, 1888, H. V. Rowe says: "I am writing to Mr. Evans about the lease of the land."

On March 14, 1888, Rowe Brothers wrote to Evans: "We should like to have at least as *favorable terms* as those of the lease you have given to Messrs. Coleman & Bugbee, viz., *a lease for two years from September* 7, 1887, *at* 4 *cents per acre.*" (*Id.*, p. 18.)

A. E. Gerand, another agent of Phelps (*id.*, p. 17), testifies: "Two of defendants, Alfred and H. V. Rowe, were present, and the question of releasing the lands was discussed. *They were perfectly willing to release, and admitted that they were using the lands.* The witness was not authorized to lease to them, and simply reported the fact to Evans at Austin, Texas. On May 1, 1888, H. V. Rowe called on the witness at Mobeetie with respect to the rental of lands. *He admitted that they were deriving as much benefit from the land as if they had it leased*, and that they did not propose to pay the same as they paid the State. * * * He stated

further that, having leased the lands alternating with plaintiff's, three months after the expiration of their lease, they could not be held responsible for grazing on plaintiff's land, *and, having that much advantage of plaintiff, they proposed to hold it and disgorge nothing. They desired to make an arrangement for the future, on the terms of 2 cents per acre for three or four years, and the surrender by plaintiff of his portion of the fences to them at the expiration of that time.* He stated, furthermore, that they were compelled to lease the State lands at the point of a pistol—metaphorically speaking—and that they did not consider that they were compelled to pay individuals for their land at the rate paid the State; that they paid the State more than the land was worth, and that *individuals would have to bear the burden of what they considered the State's overcharge; that the plaintiff's demand on them was for about $3,000, and they would rather spend that amount fighting the case than to pay it to the plaintiff.* (*Id.*, p. 22.)

The plaintiff also introduced evidence to show that the inclosure had been overstocked by cattle in the years 1887 and 1888, and that in the summer of 1888 the defendants "had to remove from the pasture about 8,000 head of cattle, which they turned outside upon land belonging to plaintiff and the public-school fund, these lands being in alternate sections and uninclosed."

The plaintiff introduced evidence to show that defendants used one water tank upon a section of plaintiff's land, and "built corrals or stock pens on sections 9, 51, and 125, in block 22, which they continued to use up to the time of trial, and that they inclosed five or six hundred acres of land, a large portion of which was on section 115, in block 21, belonging to plaintiff. This land was kept for a hayfield, and hay was annually cut for the consumption of the cattle."

Rowe Brothers also kept on the range the cattle of others—750 head of cattle for O. H. Nelson; 500 for Julius Strauss; 500 for John Pope, and one thousand belonging to

their employés—and for pasturing and taking care of these cattle received from the different parties compensation at the rate of from $1.50 to $1.75 per head per annum. For 2,750 head of cattle this would be, at the former rate, $4,125 per annum; at the latter, $4,812.50 per annum. They had altogether within the inclosure belonging to themselves and others some 20,000 head of cattle. The plaintiff "introduced evidence tending to show that of such lands as are within the said inclosures about 20 acres are required for each head of stock, and that not less than said number of acres would be sufficient, ordinarily, for their maintenance from year to year." At this rate the 310,000 acres would support about 15,500 head of stock. It was proved that the rental value of the lands was 4 cents per acre. (*Id.*, pp. 22 and 23.)

The circuit judge, after reciting the admitted and undisputed facts, that the plaintiff is the owner of 141 sections of land of 640 acres each, as claimed in the controversy; that the defendants held under lease from the grantor of plaintiff 124 sections of said land, which leases expired April 14, 1887; that under these leases defendants had the right to build fences and other improvements on said leased lands, the ownership of which passed to plaintiff at the expiration of the lease; that the ranch of defendants is inclosed by fences, which they have kept up, and some of which are on the lands of plaintiff, and that there are in this inclosure about 74,000, acres which belong to defendants, about 90,240 acres which belong to plaintiff, and about 141,000 acres which belong to the State of Texas, and since July, 1887, have been leased by the defendants, and that defendants have kept their cattle and those of others for hire within said inclosure since the expiration of their lease, in April, 1887, concluded to the jury as follows:

"If you believe from the evidence that defendants maintained the fences around said inclosure, with the intent to control the range therein and to appropriate the grass upon

plaintiff's said lands to their exclusive use and benefit, and that they have excluded all others therefrom and have had and enjoyed the grass upon all of plaintiff's lands, then you will assess the value of the same per annum according to the evidence in the case." (*Id.*, pp. 26 and 27.)

The court might have concluded, with entire propriety, in these words: The admitted and undisputed facts show the defendants to be holding-over tenants, occupying and using the plaintiff's lands and appurtenances thereto belonging, exactly and as fully as they did before their lease expired, and therefore, in equity and good conscience, under an implied contract to pay therefor as much as the same is fairly and reasonably worth, and it only remains for you to ascertain what this just equivalent should be.

The petition charges "that by reason of the premises herein aforesaid the defendants, severally and as partners, became liable, undertook, and promised to pay plaintiffs the reasonable value for the use and occupation of his said lands, and, notwithstanding the said sums of money have long since become due and payment thereof has often been demanded, the defendants have failed and refused to pay said debt or any part thereof;" and then the "plaintiff further charges that defendants have had continuous and exclusive possession of said lands described hereinabove ever since the expiration of said written leases, and have, by the use of the fences erected and maintained by them and by herding, excluded all other cattle from the same." (*Id.*, 12 and 13.)

Whether this burden was necessary or unnecessary, the jury found that the same had been satisfactorily discharged, and that the defendants could not acquit themselves of their indebtedness to the plaintiff by the payment of a less sum than $7,739. (*Id.*, 13.)

As has been shown, Rowe Brothers themselves admit 4 cents per acre per annum to be "*favorable terms.*" This rate

of compensation for 90,240 acres would be $3,609 for one year, and for the three years down to the time of trial $10,827. The jury, therefore, found the *quantum meruit* to be three thousand dollars less than the sum which the defendants themselves admit would have been "*favorable*" to themselves.

The law by which the action of court and jury is sustained is included in the first elements of common law and common honesty, and perhaps an apology is due the Court for a familiar repetition, which only the challenge of it can excuse.

Authorities.

The constitution of the Republic of Texas (1836), article IV, section 13, provides—

"*That the Congress shall, as early as practicable, introduce by statute the common law of England, with such modifications as our circumstances in their judgment may require, and in all criminal cases the common law shall be the rule of decision.*"

On January 20, 1840, the Congress under this injunction enacted that—

"*The common law of England, so far as it is not inconsistent with the constitution and laws of this State, shall, together with such constitution and laws, be the rule of decision, and shall continue in force until altered or repealed by the legislature.*"

Assumpsit for use and occupation of land by permission of the plaintiff lies on an implied as well as an express promise. (*Sutton* vs. *Mandeville*, 1 Munf., 409.)

"The action of assumpsit on *quantum meruit* lies at common law." (*Henwood* vs. *Cheeseman*, 3 S. & R., 503.)

"An action for use and occupation lies where the holding is upon an implied as well as an express permission of the landlord. A tenant who, after the expiration of and payment of rent under a parol demise, continues in possession, without any new agreement with the landlord, cannot, in an

action against him for the use and occupation of the premises subsequent to the expiration of the former term, dispute the title of the plaintiff, and his subsequent holding will be deemed to have been by the implied permission of the original lessor." (*Osgood* vs. *Dewey*, 13 Johns., 240.)

"Assumpsit is maintainable at common law for the use and occupation of lands or tenements, although no express contract or promise; a promise to pay being implied." (*Logan* vs. *Lewis*, 7 J. J. Marshall, 3.)

"It is said, in some elementary books, that a statute of George II gave the action of assumpsit for use and occupation, and that the common law allowed no such remedy. This is a mistake, although it seems to have been sanctioned by the loose *dicta* of some judges. * * * If an action could not have been brought on an express contract for rent, in consequence of the application to it of the statute of frauds, was there no remedy at common law? Surely there was, because there was still a legal liability. * * * When there was no express contract of lease a promise might have been implied and assumpsit maintained" (Robertson, C. J., *id.*, pp. 4 and 5). "He occupied without molestation and it must be taken that it was with the assent of the grantee." (*Id.*, 6.)

"It is true that the statute of 11 Geo. II, c. 19, § 14, enacted that the action might be sustained when a demise has been proved, but the action existed before the statute was enacted, and the only effect of the statute was to enlarge its sphere. Privity of contract is doubtless essential in all cases. But when the defendant has entered and occupied by permission of the plaintiff, without any express contract, the law implies a promise on his part to make compensation or pay a reasonable rent for his occupation. In such a case the consent of the owner to the defendant's entry, followed by such entry and by subsequent occupation, may be considered equivalent to a demise or at least *prima facie* evidence of a demise. *This is because a demise, with a correspondiny agreement to pay rent or make compensation for the use of the property, is consistent with an unexplained entry by the owner's consent, and because it is a reasonable presumption that occupation thus taken was intended to be paid for.*" (Strong, J., in *Carpenter* vs. *U. S.*, 17 Wall., 493.)

"If a party continues to occupy and use premises, after being notified by the owner that if he does so he will be expected to pay rent, the occupant will thereby become liable to the owner for the use and occupation" (*Illinois Central R. R. Co.* vs. *Thompson*, 116 Ill., 159). This "does not seem to be controverted, and, indeed, could not be under repeated decisions of this court." (*Id.*, 162.)

"*Where party holds over after time expires, with notice that new terms will be required, his assent will be presumed.* Where a party, who had leased a part of a dock yard, was notified by the owner before the expiration of his term that he could have the same no longer, unless he took the entire premises and paid a certain price per foot frontage as rent, and the tenant held over and occasionally did use the entire premises, but objected to the new terms sought to be imposed; *held* that by remaining for another year after such notice, notwithstanding his objection, he became liable to pay for the whole premises, according to the new terms imposed, and that it would be presumed he finally acceded to them." (*Griffin* vs. *Kinsely*, 75 *id.*, 412.)

"Where possession is taken by one, with the permission or assent of the owner, from such possession the relation of landlord and tenant is implied, as well as a promise to pay rent." (Wood on Landlord and Tenant, p. 13.)

"One who goes into possession of land as a mere 'squatter' holds as tenant at will of the true owners." (*Gay* vs. *Mitchell*, 35 Ga., 139.)

"The entry upon lands under or by consent of the legal owner or of one of several tenants in common is as to such entry a tenancy" (*Wood* vs. *Drouthett*, 44 Tex., 366). "The owner may claim that the occupant holds as his tenant, although there has been neither a written nor parol contract to this effect. If one has assumed the rights of a tenant the owner may so treat him, and, though there is no contract between them, he will be estopped from denying the tenancy, and it is by no means true that the payment of rent or other consideration is necessary to impress upon the occupant of land the character of a tenant." (*Id.*, 371.)

This is repeated and reaffirmed by the supreme court of Texas in 1883, the court adding:

"Although these remarks refer to the owner and the occupant of land, they are equally applicable to the case before us, for we must suppose that S., the preceding tenant, acted in good faith towards his landlords, and that Francis could not have obtained the possession without an agreement to become their tenant." (*Towery* vs. *Henderson*, 60 Tex., 296.)

From the permissive occupation of premises, prior to or pending the execution of a lease, the relation of landlord and tenant will be implied, even though the tenant afterwards refuse to execute the lease." (*Dunne* vs. *Trustees*, 39 Ill., 578.)

"After the expiration of a lease for a year, if the tenant holds over, the law considers him responsible to his landlord, as on a hiring for another year, upon the same terms as before." (*Bacon* vs. *Brown*, 9 Conn., 338.)

"Where one enters into possession of vacant demised premises by the consent or permission of the tenant, he will be considered, in respect of the landlord's rights, as substituted in the place of the tenant, although he disclaim all privity with the tenant." (*Howard* vs. *Ellis*, 4 Sandford, 369; *Benson* vs. *Bolles*, 8 Wend., 175; *Jackson* vs. *Miller*, 6 *id.*, 229.)

The holding-over tenant may be treated as continuing the tenancy at the option of the landlord.

"The law fixes the tenant's liability for holding over independent of his intention. The legal presumption of a renewal from the holding over cannot be rebutted by proof of a contrary intention on the part of the tenant." (*Clinton, &c., Co.* vs. *Gardner*, 99 Ill., 151.)

But—

"The tenant has no such election." (*Conway* vs. *Starkweather*, 1 Denio, 113; *Vrooman* vs. *McKaig*, 4 Md., 450.)

"The right of the landlord to elect to continue the tenancy is not affected by the fact, that the tenant has refused to renew the lease, and has given notice that he has hired other premises. *It is not in the power of the tenant alone to throw off the character thus imposed upon him.*" (*Schuyler* vs. *Stone*, 51 N. Y., 309.)

"An action of trespass to try title can be maintained to recover possession of rents of real property from a tenant holding over after the expiration of his term." (*Lamb & Wynne* vs. *Beaumont, &c., Co.*, 2 Tex. Civ. App., 289; *S. P. Thurber & Co.* vs. *Conners*, 57 Tex., 96.)

II.

Rowe Brothers, who could only be induced to pay the legal compensation for the State lands "at the point of a pistol" (the metaphor of "the point of a pistol" being, in their vernacular, the appropriate synonym for the enforcement of the law), arrived at the conclusion, that the sum which they were compelled to pay, under the statutory fire, for the State lands might plausibly and pleasantly be deducted from the sum, which *ex æquo et bono* they were bound to pay the plaintiff for the plaintiff's land; and that the "pistol," which had been pointed at them to enforce their dues to the State, might be emulated and counterpoised by the pistol they could point at the plaintiff to avoid their dues to him. Accordingly, they concluded they would rather spend the amount of plaintiff's demand "fighting the case than pay it to the plaintiff." (*Id.*, 22.)

It occurred to them that, by the benevolent magic of what they construed to be the law of trespass or of non-trespass in the State of Texas, they might continue the pleasing occupation of "deriving as much benefit from the land (of plaintiff) as if they had it leased" without expense to themselves. They therefore resolved, in view of what they conceived to be the statutory provocative and sanction of such conduct, to claim for themselves the position of parties engaged

in habitual trespass and protracted violation and demolition of the property of others. They claim this position and indignantly resent the interpretation by counsel, court, or jury which will disclaim it for them. They take this stand, avowedly, on the ground that it is a privileged, preferred, and meritorious position; they take it by reason of what they assert to be the tenderness of the Commonwealth of Texas for high-handed rapine and spoliation. They admit in their own testimony "that they had to lease the State school lands in order to obtain exclusive use of the land owned by themselves in fee simple alternating therewith. If they had not done so, they would have to remove their fences and throw their lands open as if they were common" (*id.*, pp. 23 and 24). And having "at the point of a pistol" thus "leased the lands alternating with plaintiff's, three months after the expiration of their lease, they could not be held responsible for grazing on plaintiff's land, *and, having that much advantage of plaintiff, they proposed to hold it and disgorge nothing.*" (*Id.*, 22.)

This unstinted and somewhat artless, as well as heartless, exposure of voracity and meditated craft might well cause the gorge to rise in any court sufficiently to make such gentlemen "disgorge." It may not be wholly improper, to rescue the law of Texas from the imputations the plaintiffs in error cast upon it; to show that it is not the sanctification of spoil and free-booting; that it does not legalize pillage; nor give the unconditional *carte-blanche* to voluntary and high-handed trespass, which the plaintiffs in error seek so vehemently to impose upon it.

The following are the enactments having any bearing on this subject:

LAND ACTS.

Act of April 17, 1879, Laws of 1879, Regular Session, p. 101.

Whereas many persons in this State have inclosed a large portion of the public free-school lands, and have thus sev-

ered them from the public common, and are using them for pasturage to the exclusion of all others, thereby giving just cause of complaint: Therefore, &c.

SECTION 1. That each and every person who shall have inclosed by fencing or otherwise any of the public free-school land belonging to the State and shall use the same to the exclusion of the public shall pay an annual rental value therefor of the sum of $25 for each section so inclosed.

It will be noted that this section relates to inclosure "by fencing or otherwise." This "otherwise" must allude to the practice of cutting off cattle from going beyond a certain limit to the south by what is called a "drift fence." This is a single line across a territory, barring further passage towards the south or southeast, the natural direction in cattle "drift" before the winter "northers."

Section 2 makes it the duty of the surveyor of each county to report to the county commissioners' court on the first Monday in June yearly the number of sections inclosed during the past year and the names of the persons controlling the same, &c.

Section 3 provides that the said court shall record a copy of the list and forward one to the comptroller and deliver one to the county tax-collector.

Sections 4 and 5 provide for collection by collector.

SEC. 6. "Any person who shall control inclosed lands belonging to the public free schools, and fail to pay the rental value as specified under the provisions of this act upon the demand of the collector, shall be subject to prosecution upon complaint, information, and indictment, and fined in the sum of one hundred dollars for each section so inclosed."

2. Act of April 13, 1883, provides for leasing lands generally for terms not to exceed ten years. (Acts 1883, p. 89, sec. 16.)

3. Act of April 1, 1887—took effect July 4, 1887—amends the land sales and lease laws. Article 4052, Sayles' Texas

Civil Statutes, provides how leases shall be made, and contains provisions for sale of leased lands to settlers and, to cover case of purchasers in pastures under lease, contains this *proviso:* "*Provided further*, That no actual settler who shall purchase land within any leasehold shall be permitted to turn loose more than one head of cattle or horses for every ten acres of land purchased by him and uninclosed, or in lieu thereof four head of sheep or goats to every ten acres of land so purchased and uninclosed."

Each violation of the provisions of this act which restricts the number of stock that may be turned loose on lands leased from the State shall be an offense, and the offender on conviction shall be punished by fine of not less than one dollar for each head of stock he may so turn loose, and each thirty days' violation of the provisions of this section shall constitute a separate offense.

4. Article 4055, Sayles' Texas Civil Statutes, same act of April–July, 1887, reads:

"It shall be unlawful for any person to fence, use, occupy, or appropriate by herding or line riding any portion of the public lands of the State, or of the lands belonging to any particular fund specified in this act, without having first obtained a lease of such lands in accordance with the provisions of this act. Any person, whether owner of stock, manager, employee, or servant, who shall fence, use, occupy, or appropriate, by herding or line riding, any portion of such lands without a lease thereof, shall be deemed guilty of a misdemeanor, and shall, upon conviction, be fined not less than $100 nor more than $1,000, and, in addition thereto, shall be imprisoned in the county jail for a period of not less than three months nor more than two years. Each day of such fencing, using, occupying, or appropriating, by herding or line riding, shall be deemed a separate offence, and any person so offending may be prosecuted, by indictment or information, in the proper court of the county where any portion of the land lies or to which it may be attached for judicial purposes, or in the county of Travis [the capital is in this county], and jurisdiction of such offences is hereby vested in said courts; and in case any indictment or information is preferred or filed against a non-resident of this State for a violation of this section, it shall be the duty of the governor to demand the extradition of the defendants from the proper officer of any State or Territory where

he may be found in order that he may be brought to trial. 'Fencing,' within the meaning of this act, is the erection of any structure of wood, wire, or both, or any other material intended to prevent the passage of cattle, horses, mules, asses, sheep, goats, or hogs, whether the same shall inclose lands on all sides or be erected on one or more sides. Any appropriation of land belonging to any particular fund specified in this act, or of the public lands of this State, without first having obtained a lease thereof, by fencing of any kind, or by inclosures consisting partly of fencing and partly of natural obstacles, or impediments to the passage of live stock, shall be deemed an unlawful appropriation, punishable as provided in this section for appropriating such lands, and each day said land is so appropriated shall be deemed a separate offense."

Fences.

FEBRUARY 5, 1840.

1. Sayles' Texas Statutes, article 2431, defines the sufficient fence.

Article 2432 provides for renewing the fence and injury done and provides for assessment of damages by a freeholder summoned by the J. P.

Article 2433 provides for impounding stock where there is a lawful fence upon the second trespass committed.

Article 2434. Owner not liable for damages if the fence is insufficient.

Article 2435. Persons who have insufficient fences prohibited, under penalty, from killing, wounding, &c., stock on lands.

2. Article 2435*a* (act of February 6, 1884) provides for an unlocked gate every three miles in pasture fences. (This evidently to give mode of travel through the county.)

3. Article 2435*b* (act of July 4, 1887):

§ 1 prohibits removal of division fences by one joint owner.

§ 2 provides for withdrawal after 6 months' notice.

§ 3. Penalty for continuing to join after other has removed or disconnected lawfully.

Amended slightly April 6, 1889.

Not relating to anything substantial.

Changes penalty and adds to 3d section.

The act of March–June, 1891, provides that having fences around a large tract, within which another's land lies, shall not be peaceable and adverse possession, so as to give title by prescription. (Gen. Laws 1891, p. 71.)

It is the duty of one taking cattle to pasture to keep his fences in repair, to make it a reasonably safe inclosure for the cattle.

McAuley *vs.* Harris, 71 Tx., *page* 640.

For the purposes of this argument, it may be conceded that the common-law rule has been so far modified, that the owner of straying cattle is not liable in an action of trespass, for the mere straying of his cattle upon the unfenced land of another. Irrespective of any material injury, at common law he would be so liable for such violation of another's property. But in view of the vast expanse of unoccupied land, formerly in Texas, this was treated as *damnum absque injuria*, and it was so treated in law because it was so in fact. No loss had been sustained of which any one was conscious. The trespass was technical only. If, in such case, A owned unfenced lands and B's cattle, in roaming the country (as would happen more often formerly, when the greater part of the State was public land, than now), strayed upon A's land and grazed there, A could not recover of B (as at common law he might) damages on account of this casual straying and pasturing. On the other hand, A could drive them off. He owed them no care, and if they became mired in marshes, or fell into pits, or were stolen or killed by others, or contracted disease from other cattle on the same land A was not liable to the owner. All that could be expected was that he should not wilfully do them injury. Where, for example, "it was alleged and proved that ap-

pellee entered upon appellant's land with sheep and herded and pastured said sheep upon said land for several days," the court said: "The sheep were not loose and straying upon said land, but were driven and herded upon it by appellee against the written protest of appellant. Such being the case, appellee is unquestionably liable for the damage directly caused and naturally and proximately resulting from appellee's wrongful act." (*Ohio Wool Growing Co.* vs. *Bogel*, 3 Tex. Civ. Appeals, § 273, p. 331.)

The plaintiff, therefore, was entitled to recover "for grass consumed, &c., by defendant's sheep, which had been herded upon plaintiff's land for several days" (*id*). The principle plainly is that B has no right to drive his cattle upon or near to A's land with the intent that they should graze upon it.

In Davis *vs.* Davis, 70th Texas, 123, the supreme court said incidentally that "the rule of the common law has not been regarded as applicable to the condition of lands in this State, where, for a long time throughout its limits and still in many sections, the inclosure is the exception and the open land the rule. Still, every owner of land in this State is entitled to its exclusive enjoyment." Therefore the court enjoined defendant from turning his cattle upon plaintiff's land, although said land was imperfectly fenced. The public policy of Texas some years prior to this suit underwent a radical change with respect to grazing lands. In 1879 the State instituted the policy of raising revenue from her hitherto public grazing grounds. Cattle grazers had begun to abandon the practice of turning the cattle loose upon the plains to range at will, mingling with others, and instead to inclose large pastures, and the State, as the owner (with rare exceptions) of alternate sections therein, had to pass laws for her own protection. The first law on the subject was the one heretofore cited (Acts of 1879, ch. 92, § 6).

If, therefore, there were statutes which might be held to give immunity against an action of trespass in the case of

cattle straying, without the intention of the owner, on the lands of another, there was certainly none which entitled the owner of the cattle to take virtual possession of and use the lands. Nor to accomplish such virtual possession and use is it necessary, that one should actually drive his cattle upon the lands of another and herd them thereon. If he so disposes his cattle that they must inevitably occupy the lands of his neighbor and consume his grass, it is the same as if he drove them there for the identical purpose. As was said in the case of *Davis* vs. *Davis*, "*The object of the statute was to afford an easy remedy for trespass by live stock to such land-owners as complied with its provisions, but was not to throw open to the use of the public the land of all proprietors who did not observe the statutory requirements in making or maintaining these inclosures. We are not prepared to say that the legislature had the power to make all private lands in the State, when not inclosed in a particular manner, common grazing ground, if it had so desired. Similar laws in other States have been held to confer upon owners of trespassing cattle immunity from a suit for damages done by them, when the inclosure is not such as the law requires, but not to confer any right to the use of the land.*" (70 Texas, 123.)

Such is the tenor of the decisions by courts, which have held that, owing to the peculiar conditions of the country, the common-law rule as to trespass was not in force.

Thus, in Ohio, after remarking that the rule as to the trespass of cattle upon uninclosed lands was not suited to the conditions and customs then prevailing in that State, the court significantly adds: "The right to allow animals inoffensive in their habits to run at large does not imply a right of the owner to keep his creatures upon another's uninclosed lands against his consent." (*Kerwhacker* vs. *C. C. and C. R. R. Co.*, 3 Ohio St., 183.)

In Kansas it is said that the mere fact that fence laws exist, or laws regulating the running of stock at large, &c., does not confer a right to invade the land of another. They

impliedly authorize cattle to run at large, and relieve the owner from damages for injuries done by them while wandering or straying at large, but do not authorize them to run at large upon the lands of others. It would not be within the power of a legislature to give one man the legal right to invade the property of another simply because the land-owner had not fenced it. In case of such omission the land-owner "*has not thereby lifted up the wrongs and trespasses of others upon his own rights to be moral virtues or legal rights to be protected and encouraged by law, as seems to be supposed*" (*U. P. R. R. Co.* vs. *Rollins*, 5 Kan., 167). "*There is no statute that gives or attempts to give to any person any rights upon another's land, whether it is fenced or not. A statute of that kind would tend to disturb vested rights and be unconstitutional and void*" (*id.*, p. 176). In *Caulkins* vs. *Matthews* the same court, referring to the Collins case, said: "This case, as that, was tried upon the *erroneous* theory that the plaintiff had a *right* to pasture his stock upon the uninclosed lands of the defendant" (*id.*, p. 199). And in *Larkin* vs. *Taylor* the same court says that the object of the law of inclosures is to avoid the legal consequence of "negligence or carelessness in the ordinary acceptation of those terms"—something that would be "a mere harmless inattention"—but the object is not to protect "a willful or wanton trespass not intended to be protected by our fence laws." (*Id.*, p. 446; *S. P. Powers* vs. *Kindt*, 13 *id.*, 74; *Melody* vs. *Reab*, 4 Mass., 471.)

In *De Lancy* vs. *Erickson*, 11 Nebraska, 533, it was held that while the common-law rule did not prevail, still an owner was not required to fence against intrusion; that the owner was not entitled to recover in trespass when the animals wander upon the land; but that the rule is different where they are driven upon the land without the owner's permission. This case is cited with approval in a case in Iowa (Otis *vs.* Morgan, 61 Iowa, 712) in which the plaintiff had a part of his land inclosed by improper fences. The defendant drove his cattle on the uninclosed land, and they

broke through the fence and injured the plaintiff's crops. The court held that the plaintiff was entitled to no protection against wandering cattle, because his fence was clearly not such a fence as the statute required; but the judgment was sustained on the ground that although the common-law rule was not in force in that State, yet that exception only applied in cases where the cattle, in roaming the prairies, wandered on another's land, not where they were driven or kept there.

In Colorado it has been held (Morris *vs.* Fraker, 5 Colorado, 425) that the common-law rule did not apply, but in Willard *vs.* Mathesus, 7 Colorado, 75, it was found necessary to limit the doctrine. In that case the defendant's sheep were being grazed under herd. They went upon defendant's land and through his fence, which was built against cattle only, and did not prevent the entrance of sheep, damaging his crops. The court held defendant liable. Referring to Morris *vs.* Fraker, the court said that case "is based largely upon the general custom that has always prevailed among stockmen in this country of allowing their cattle to roam at will upon the public domain." It then proceeds to draw a distinction between cattle roaming at will and sheep wandering the country in charge of a herder. The decision could not be based upon the ground that the sheep were driven on the field, for they were not, and it therefore went upon the ground of negligence of the herder; but if one has a right to let his animals run at will over uninclosed lands of others, he is under no obligation to see that they do not depredate thereon, even though he may have agents present who could prevent their doing so.

The truth is that the country has undergone a vast change since the earlier decisions, and some of the courts are fast to perceive it, and the tendency is back to the sound rule of the common law, pursuant to the change in public policy. For example, look at Texas, where this case arose. The public lands had been grazed for years until the great cattle-

owners began to claim "free grass" as a right of property by prescription, but public policy was made to change, and the lands formerly grazed over freely must, since the 17th day of April, 1879, be leased under severe penalties. Cattle have ceased to roam the prairies at will. They are now covered into great pastures, where artificial ponds called tanks provide the water that they used to wander many miles to find in time of ordinary drouth, and where *corrals* afford facilities for marking and branding and separating the beeves or those gathered for market, as well as for attending to those pastured and cared for for hire.

The plaintiff in error is much impressed by the case of *Pace* vs. *Potter*, 85 Texas, 473, and says it conclusively establishes his contention. If so, his contention can be established by another very easily distinguishable from it, and which is as follows:

The Kit Carter Company owned a large body of land. Plaintiff owned nine sections immediately west thereof. "Other persons, who pastured the lands lying contiguous to said cattle company's land, in inclosing their lands for pastures, constructed lines of fence on the east, north, west, and south sides of the said lands belonging to plaintiff and the cattle company. The lines of fence thus constructed connected with each other, and the lands of the plaintiff and of the Kit Carter Cattle Company were thus included in a common inclosure" (*id.*, p. 475). The plaintiff did not so much as know that his land was inclosed until shortly before the institution of the suit. The cattle company had a half interest in about a mile of fence on the south side of that portion sold afterwards to defendant. In July, 1888, the Kit Carter Cattle Company built a fence, on and along the east line of 41,000 acres sold to defendant, thus leaving the lands of plaintiff and defendant in a common inclosure. This fence was built at the instance of the defendant as part of the inducement to him to purchase, and in the following March—*i. e.*, March, 1889—the defendant separated

his land from that of plaintiff by building a fence between them. Between July of one year and March of the next the plaintiff and defendant were liable to depasture each other, a possibility which was concluded by the fence which the defendant erected. The defendant had never been, expressly or by implication, tenant to the plaintiff nor successor to any one who had been. Each owner had the right to put his own cattle on his own land, and this is what each owner did; nor was there any evidence that the land of either was overstocked. Under such circumstances the casual trespass of either, which it is plain on the part of the defendant was neither designed nor desired (or he would not have built a fence to prevent it), might not unjustly be considered *damnum absque injuria*. "By the fences of *other* land-owners the territory occupied by the plaintiff and defendant became surrounded by fences. The defendant put cattle upon *his* land. *Held*, that such act and conditions did not make him liable in damages from his cattle pasturing upon the lands of the plaintiff" (*id.*, p. 473). But even in this case the court takes pains to say: "*The defendant would have been liable to the plaintiff if he had taken exclusive possession of the land inclosed.*" (*Id.*, p. 477.)

This is simply an application of the law on the subject of cattle straying from accident and not design, and having no application whatever to the case of the permanent appropriation and wholesale use of the property of another. The law of the land of Texas is just and worketh no such iniquity. It may be found in the following adjudication:

"Where the owner of several tracts of land, in inclosing them within one large inclosure, necessarily inclosed a tract belonging to another, this is an appropriation of such other person's land, and the pasture-owner is liable in trespass to try title for rental value of the tract thus inclosed, although the pasture fence contains gates every three miles, and the pasture-owner disclaims title and possession of such tract."

St. Louis Cattle Company vs. *Vaught*, 1 Texas Civil Appeals, 388.

In thus deciding the court uses this language:

"In this State, on account of the condition which has existed from time immemorial of the grazing lands, the owner of such property cannot complain as long as it remains a portion of the 'commons;' that the cattle of another should roam over it and graze upon it at will (*Davis* vs. *Davis*, 70 Tex., 123; *Buford* vs. *Houtz*, 133 U. S., 320). This doctrine, however, does not authorize the owner of cattle *by affirmative conduct on his part* to appropriate the use of such lands to his own benefit. He will not be permitted thus to ignore the truth that every one is entitled to the exclusive enjoyment of his own property. In this case the appellant, by means of fences constructed or maintained, inclosed the land of appellee in such manner as to reap from it those benefits, which as a rule are incident exclusively to ownership. *The use and enjoyment of the property under such circumstances import necessarily the idea of liability.*"

1 Tex. Civ. App., 390.

In this case the two assignments of error filed by the appellant complain of the action of the court, in instructing the jury as shown by the third paragraph of its charge, and in refusing the special charge asked by the defendant. The third paragraph is as follows:

"If you find from the evidence that the defendant built and erected a fence completely inclosing a quantity of land, in which inclosure it embraced the survey sued for, and you find defendant is using the land sued for, in the same manner it is using the other part of such larger inclosure—for the grazing of cattle—then the defendant is in possesion of said survey No. 23; and if you so find you will also find for plaintiff the value (if any) of the use and occupation of said survey No. 23 for the time said survey has been so embraced and used; not, however, giving the value of the *use and occupation* for a longer time than from May 4, 1887 [a date two years prior to the bringing of the suit], to the present time."

The special charge which was refused was as follows:

"If the defendant in inclosing its own land, which surrounded the land of plaintiff, necessarily inclosed the land of

plaintiff, but made no claim of title to same, and placed none of its fences on plaintiff's land, and did not refuse plaintiff the use and occupation thereof, but offered him free access thereto, the plaintiff could not be allowed to recover rent."

The court of appeals adjudicate:

"The charge complained of involves the conclusions reached by us, and is therefore, in our opinion, proper. It hence follows, also, that the instruction requested was correctly refused." (*Id.*)

The instruction granted announces a doctrine which would sustain the plaintiff, Phelps, even had there never been, in his case, any relation of tenancy, expressed or implied. By the refusal to grant the other, the court denounces the doctrine of Rowe Brothers, even if the case sought to be shown by them had been established.

LEAKE, HENRY & REEVES,
LEIGH ROBINSON,
For Defendant in Error.